



**ASSESSING THE FEASIBILITY OF THE INSTITUTIONAL DESIGN OF AN  
EXPANDED AND DEVOLVED TRADE AND INVESTMENT SECTION OF THE  
AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS**

By

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## **DEDICATION**

In memory of my late Dad, Thomas Browns Obed Akhonya.

## DECLARATION

I, **WILFRED AKHONYA MUTUBWA**, declare that this thesis is my own original work and that all the sources that I have used or quoted in this thesis has been indicated and acknowledged by means of complete references. This thesis has not been presented in any other institution.

Signed ..... Date .....

## **SUMMARY OF THESIS**

Africa has always aspired for the economic integration of its markets. This endeavour is evident right from the 1960s clamour for independence and shortly thereafter, as newly independent states. During this period African countries under the umbrella of the OAU underscored economic cooperation as the basis for intra-African relations. However, it was not until the year 1991, with the conclusion of the AEC Treaty, that the continent formally adopted a framework and roadmap towards continental economic integration.

The 40-year roadmap towards a continental economic community was premised upon the two principles of harmonisation and devolution. Moreover, the six-stage integration process set out in Article 6 of the AEC Treaty identifies the eight RECs in Africa as the building blocks for the continent's proposed single market and economic union. It also underpinned the economic integration of the continent on the harmonious co-existence of the RECs.

A step-wise ambitious integration model was adopted under Article 6 of the AEC Treaty. The model envisaged the creation of a Free Trade Area (FTA), followed by a Customs Union, a Common Market and ultimately a fully-fledged Economic Union. As a first step towards the continental integration, the African Continental Free Trade Area (AfCFTA) was unveiled in 2018.

Cross border, intra-African trade, is bound to lead to a rise in investment and commercial transactions on the continent. This, in turn, will inevitably lead to disputes which require resolution. The economic integration of the continent is fast evolving under the aegis of the AU; whose dispute settlement system is currently also under review. Significantly, the AU has consolidated its dispute settlement mechanism, following the merger in 2008 of the ACJ and ACH&PR, into a single AU court, known as the African Court of Justice and Human Rights (ACJ&HR).

It is within the context of the merged AU single court that this thesis grounds itself. It seeks to interrogate the adequacy of the continental trade and investment dispute settlement system and examines its viability within the consolidated AU dispute settlement system. While the AU led continental economic integration gains pace, the dispute settlement system, critical for the integration, is either lagging behind or is not receiving adequate attention. As a result, the dispute

settlement systems created under the AEC and AfCFTA are incongruent with the principles of harmonisation and devolution, which underpin the continent's economic integration goals.

The recommendations proffered, align with the philosophy of harmonising and devolving the continental trade and investment dispute settlement system. The research proposes to locate the continental trade and investment dispute settlement within the AU single court system. The principal recommendation is not only to expand the Court's jurisdiction in order to accommodate the trade and investment mandate, but also to use sub-regional REC judicial organs as courts of first instance for the ACJ&HR. A hierarchical order of the continental court system, with the single AU Court at the apex, is also proposed in this study as the supreme overarching supranational judicial organ.

**KEY WORDS:** African Union (AU); Regionalism; Regional Economic Communities (RECs); Supranationalism; African Court of Justice and Human Rights (ACJ&HR); and the African Continental Free Trade Area (AfCFTA).

## **LIST OF ABBREVIATIONS**

<b>AAA</b>	African Arbitration Association
<b>AALCO</b>	Asian African Legal Consultative Organisation
<b>AB</b>	Appellate Body
<b>ACB</b>	African Central Bank
<b>ACC</b>	African Commercial Court
<b>ACH&amp;PR</b>	The African Charter on Human and Peoples’ Rights
<b>ACJ &amp; HR</b>	The African Court of Justice and Human Rights
<b>ADR</b>	Alternative Dispute Resolution
<b>AEC</b>	African Economic Community
<b>AfAA</b>	African Arbitration Association
<b>AfCFTA</b>	The African Continental Free Trade Area
<b>AfCFTA DSB</b>	AfCFTA Dispute Settlement Body
<b>AFSA</b>	Arbitration Foundation of South Africa
<b>AMF</b>	African Monetary Fund
<b>AMU</b>	Arab Maghreb Union
<b>APPER</b>	Africa’s Priority Programme for Economic Recovery
<b>APRM</b>	African Peer Review Mechanism
<b>AT</b>	Arbitration Tribunal of ECOWAS
<b>AU</b>	African Union
<b>AU Act</b>	Constitutive Act of the African Union, 2000

<b>BEAC</b>	Bank of the Central African States
<b>BCEAO</b>	Commission and the Central Bank of West Africa
<b>BIAT</b>	Boosting Intra Africa Trade
<b>BIT</b>	Bilateral Investment Treaty
<b>CACJ</b>	Central American Court of Justice
<b>CADR</b>	Uganda Centre for Arbitration and Dispute Resolution
<b>CAS</b>	Court for Arbitration for Sports
<b>CCJ</b>	COMESA Court of Justice
<b>CCJA</b>	Common Court of Justice and Arbitration of the OHADA
<b>CEMAC</b>	Central African Economic and Monetary Community
<b>CEN-SAD</b>	Community of Sahel-Saharan States
<b>CETA</b>	Canada-European Union Trade Agreement
<b>CIArb</b>	Chartered Institute of Arbitrators
<b>CJEU</b>	Court of Justice of the European Union
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>CRCICA</b>	Cairo Regional Centre for International Commercial Arbitration
<b>DRC</b>	Democratic Republic of Congo
<b>EAC</b>	East African Community
<b>EACJ</b>	East African Court of Justice
<b>EACSO</b>	East African Common Services Organisation
<b>EAHC</b>	East African High Commission
<b>EALA</b>	East African Legislative Assembly
<b>EC</b>	European Community



<b>ECCAS</b>	Economic Community of Central African States
<b>ECHR</b>	European Convention on Human Rights
<b>ECJ</b>	European Court of Justice
<b>ECOSOC</b>	Economic, Social and Cultural Council
<b>ECOWAS</b>	Economic Community of West African States
<b>ECSC</b>	European Coal and Steel Community
<b>EPA</b>	Economic Partnership Agreements
<b>EU</b>	European Union
<b>FDI</b>	Foreign Direct Investment
<b>FTAs</b>	Free Trade Areas
<b>GATT</b>	General Agreement on Trade and Tariffs
<b>GDP</b>	Gross Domestic Product
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICT</b>	Information and Communications Technology
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>IGAD</b>	Intergovernmental Authority on Development
<b>IGADD</b>	Intergovernmental Authority on Drought and Development
<b>IHL</b>	International Humanitarian law
<b>ILC</b>	International Law Commission
<b>IMF</b>	International Monetary Fund

<b>IPA</b>	Investment Protection Agreement
<b>ISDS</b>	Investor State Dispute Settlement System
<b>ITLOS</b>	Tribunal for the Law of the Sea
<b>KIAC</b>	Kigali International Arbitration Centre
<b>LACIAC</b>	Lagos Chamber of Commerce International Arbitration Centre
<b>LCA</b>	Lagos Court of Arbitration
<b>LCIA</b>	London Court of International Arbitration
<b>LFA</b>	Lagos Final Act
<b>LPA</b>	Lagos Plan of Action
<b>LRCICA</b>	Lagos Regional Centre for International Commercial Arbitration
<b>LSK</b>	Law Society of Kenya
<b>MENA</b>	Middle East and North Africa
<b>MFN</b>	Most Favoured Nation
<b>NAFTA</b>	North America Free Trade Agreement
<b>NCIA</b>	Nairobi Centre for International Arbitration
<b>NEPAD</b>	New Partnership for African Development
<b>NGOs</b>	Non-Governmental Organisations
<b>NTS</b>	National Treatment Standard
<b>OAU</b>	Organisation of African Unity
<b>OHADA</b>	Organisation for the Harmonization of Business Law in Africa
<b>PAIC</b>	Pan African Investment Code
<b>PAP</b>	Pan African Parliament
<b>PCA</b>	Permanent Court of Arbitration

<b>PCIJ</b>	Permanent Court of International Justice
<b>PIC</b>	Pan African Investment Court
<b>PIDA</b>	Programme for Infrastructure Development in Africa
<b>PTAs</b>	Preferential Trade Areas
<b>REC</b>	Regional Economic Communities
<b>RIA</b>	Regional Integration Agreements
<b>RISDP</b>	Regional Indicative Strategic Development Plan
<b>SACU</b>	Southern Africa Customs Union
<b>SADC</b>	Southern African Development Community
<b>SADCC</b>	Southern African Development Coordination Conference
<b>SADC-FIP</b>	SADC Protocol on Finance and Investment
<b>SAPP</b>	Southern Africa Power Pool
<b>SCIA</b>	Singapore Centre for International Arbitration
<b>SDGs</b>	Sustainable Development Goals
<b>TFEU</b>	Treaty of the Functioning of the European Union
<b>TFTA</b>	Tripartite Free Trade Area Agreement
<b>TI</b>	Transparency International
<b>UDEAC</b>	Customs and Economic Union of Central Africa
<b>UDHR</b>	Universal Declaration of Human Rights (1948)
<b>UN</b>	United Nations
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCLOS</b>	United Nations Convention on the Law of the sea
<b>UNCTAD</b>	United Nations Conference on Trade and Development

<b>UNECA</b>	United Nations Economic Commission for Africa
<b>UNIDROIT</b>	International Institute for the Unification of Private law
<b>US</b>	United States
<b>USA</b>	United States OF America
<b>WAEMU/UEMOA</b>	West African Economic and Monetary Union
<b>WTO</b>	World Trade Organisation
<b>WTO DSU</b>	WTO Dispute Settlement Understanding

## LIST OF CASES AND ARBITRAL AWARDS

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SADC Protocol on Finance and Investment

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Statute of the African Court of Justice and Human Rights

Statute of the Court of the Central American Court of Justice (CACJ)

Statute of the International Court of Justice

Treaty of Caribbean community and Common Market (CARICOM)

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Canada-European Union Trade Agreement (CETA).

Treaty Establishing the African Economic Community

Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA)

Treaty establishing the European Community

Treaty for the Establishment of the East African Community

Treaty of Lisbon (Reform Treaty)

Treaty of Paris 1783

Treaty of Rome

Treaty of the European Union

Treaty of the Functioning of the European Union

Treaty on the Harmonization of Business Law in Africa (OHADA Treaty)

Treaty on the West African Economic and Monetary Union (UEMOA/WAEMU Treaty)

Tripartite Free Trade Area Agreement

Treaty relating to the Free Movement of Persons and Right of Establishment

Universal Declaration of Human Rights (1948) (UDHR)

UN Convention on the Law of the Sea, signed at Montego Bay, Jamaica, on December 10, 1982

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My country tis of thee,  
Late land of slavery,  
    Of thee I sing.  
Land where my father's pride  
Slept where my mother died,  
From every mountain side  
    Let freedom ring!

My native country thee  
Land of the slave set free,  
    Thy fame I love.  
I love thy rocks and rills  
And o'er thy hate which chills,  
My heart with purpose thrills,  
    To *rise* above.

Let laments swell the breeze  
And wring from all the trees  
    Sweet freedom's song.  
Let laggard tongues awake,  
Let all who hear partake,  
Let Southern silence quake,  
    The sound prolong.

Our fathers' God to thee  
Author of Liberty,  
    To thee we sing  
Soon may our land be bright,  
With Freedom's happy light  
Protect us by Thy might,  
    Great God our King.

W. E. B. Du Bois, "My Country 'Tis of Thee" from *Creative Writings by W. E. B Du Bois*  
(Kraus Thomson Organization Limited, 1985)

## **CHAPTER ONE**

### **GENERAL INTRODUCTION**

#### **1.1 Background**

The 40-year plan set out by the Abuja Treaty, which established the African Economic Community (AEC), marked the formal beginning of the implementation of the economic integration of the African continent, which it projects to be completed by the year 2030. All Regional Economic Communities (RECs) in Africa are expected to merge into the AEC, a homogenous entity that encompasses the economies of all African states. This research seeks to interrogate the preparedness of the African Union (AU) member states, which are also members of the AEC Treaty, in order to establish whether there has been effective economic integration of the continent, twenty-five years after the coming into force of the AEC Treaty, and eleven years to the date of its expected full implementation. To this end, this research focuses on the African Court of Justice and Human Rights (ACJ&HR), the single AU court, its evolution, its structure, its jurisdiction; and its viability in resolving trade and investment disputes that are inevitably bound to increase with the economic integration of Africa. The research, therefore, takes trade and investment dispute resolution as the focal point for assessing the efficacy and the contribution of the court in the continental economic integration process.

Additionally, the research asserts that an effective, impartial and independent trade and investment dispute resolution mechanism is a critical component for achieving effective economic integration in Africa. As Qureshi correctly observes, the central role of international law, in shaping global trade policy, is hinged on the assumption that free trade requires the clarity and predictability of an orderly system, imperative for greater cross-border trade and globalisation, as well as for the calls for a supranational regime that would foster cooperation, order and harmonisation in international economic relations.<sup>1</sup>

The issues explored in this research are of particular relevance because of the current efforts towards the economic integration of Africa and the manner in which the process has gained

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<sup>1</sup> AH Qureshi, *International Economic Law* (Sweet & Maxwell, 1999) 230.

significant strides towards the fast approaching AEC. These efforts are largely informed by recent activities unfolding on the continent. Accordingly, the African Continental Free Trade Area (AfCFTA) has been unveiled and the merger of RECs, in the Eastern and the Southern Africa sub-regions, into one REC, through the Tripartite Free Trade Area Agreement (TFTA), had earlier been concluded in June 2015. This followed significant earlier efforts aimed at integrating the continent. For example, the OAU-era Lagos Plan of Action for Economic Development of Africa (LPA) of 1980 served as a blueprint on economic development whereby a declaration on collective self-reliant international economic order, for Africa, was agreed upon by the OAU member states.<sup>2</sup> Another important blueprint is seen in the AU Agenda 2063, an ambitious economic prosperity programme for the continent, which sets development and integration milestones of up to 100 years after the OAU's formation.<sup>3</sup> A more recent effort is found in the New Partnership for African Development (NEPAD)<sup>4</sup> whose principal objective is accelerating the economic development of the African continent through home grown, African, solutions. These solutions comprise the development of human capital, industrialisation, regional integration, natural resources governance and food security.<sup>5</sup> Additionally, NEPAD seeks to harmonise national and regional policies on infrastructure, market development and trade on regional integration.<sup>6</sup>

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<sup>2</sup>Africa Union Commission, (2015) *Agenda 2063- The Africa We Want*, Available at <https://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> accessed on 31<sup>st</sup> January 2018, 1-4. Luke notes that the AfCFTA is an AU Agenda 2063 flagship project whose cumulative effect “is to contribute to the achievement of the 2030 Agenda, in particular, to the Sustainable Development Goals, from targets for decent work and economic growth (Goal 8) and the promotion of industry (Goal 9), to food security (Goal 2) and affordable access to health services (Goal 3)”. See, D Luke, *Making the Case for the African Continental Free Trade Area* (2018) <<http://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/>> accessed on 30<sup>th</sup> September 2019 para. 20.

<sup>3</sup>ibid 4-5.

<sup>4</sup> NEPAD <<https://www.nepad.org/our-focus>> accessed on 30<sup>th</sup> February 2018. The NEPAD Agency, under the AU has since 2010 replaced the NEPAD Secretariat. This is in an effort to integrate NEPAD into the AU structure. The NEPAD Agency has coordinating offices in 53 African countries.

<sup>5</sup>ibid.

<sup>6</sup>ibid.

More recent policy declarations and plans championed by the AU have been promulgated. Adopted in 2012, during the 18<sup>th</sup> ordinary session of the AU Summit, the Programme for Infrastructure Development in Africa (PIDA), details the 51 cross-border programmes covering the four sectors of transport, energy, Information and Communication Technology (ICT), as well as trans-boundary water resources.<sup>7</sup> The Action Plan for Boosting Intra Africa Trade (BIAT) was also adopted by the AU summit in 2011, and aims at establishing strategies meant to enhance intra-African trade.<sup>8</sup>

It should be noted that the golden thread that runs through the corpus of the afore-cited AU instruments and blueprints is the proposal to employ existing and future Regional Economic Communities (RECs) as vehicles towards deepening trade integration and the ultimate creation of the African Economic Community (AEC).<sup>9</sup> Therefore, pursuant to this objective, the Constitutive Act of the Africa Union (AU Act) is particularly instructive.<sup>10</sup>

With the opening of borders, comes the relatively free movement of capital and labour, which are two key factors of production. This will further lead to the rise in trade and investment disputes. Disputes in at least four categories are bound to arise during and after the implementation of the AEC Treaty. Firstly, there are disputes which occur on the interpretation and implementation of the AfCFTA and the subsequent AEC. These disputes will usually pit member states against each other and are largely trade disputes on the interpretation of trade treaties, protocols and tariff regulation. The second category involves disputes between employees or members of the organs

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<sup>7</sup> “PIDA History” *PIDA* <<https://www.au-pida.org/pida-history/>> accessed on 30<sup>th</sup> February 2018. D Luke, (2018), notes that less-industrialized countries can benefit from the implementation of the PIDA through AfCFTA. See, Luke, (n) 2 [19].

<sup>8</sup> “BIAT – Boosting Intra-African Trade” *African Union* <<https://au.int/en/ti/biat/about>> accessed on 30<sup>th</sup> February 2018. Luke D, (n) 2 [17], observes that BIAT “is the principal accompanying measure for the AfCFTA”.

<sup>9</sup> See also, the preamble of the Abuja Treaty establishing the African Economic Community (AEC) and the communique of the third COMESA, EAC-SADC Tripartite Summit page 2 thereof

<https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html> accessed on 31<sup>st</sup> January 2018.

<sup>10</sup>Article 31 of the Constitutive Act of the AU sets out one of the core objectives of the AU as being to “accelerate the political and social economic integration of the continent and to coordinate and harmonise policies between the existing and future RECs for the gradual attainment of the union.”

of the AEC and the AEC itself. The third form relates to disputes between citizens of the AEC member states *inter se*. This category is invariably based on commercial or investment transactions whose performance transcend national boundaries in order to acquire a transnational character. These are disputes with a *locale* that cuts across state members' borders. The fourth category of disputes involve intra-African investor-member state disputes arising out of the AfCFTA and the AEC Treaty free trade area arrangements. Additionally, commercial disputes may involve the interpretation or application of contractual rights, by third parties or citizens of such third party countries, against state members of the AfCFTA and AEC.

The research situates the continental trade and investment dispute settlement system within the general AU integration framework. In doing so, this research traces the evolution of the AU single court, from the creation of the AEC Court of Justice, in the year 1991, to the establishment of a unified court of the AU. This is traced through the Constitutive Act of the African Union in 2000 (AU Treaty), to the 2003 Protocol on the African Court of Justice and the subsequent merger of the two Courts into the African Court of Justice and Human Rights pursuant to the 2008 ACJ&HR Protocol.

The Protocol fused the erstwhile Court of Justice, established under the Constitutive Act of the AU, with the African Human and Peoples Rights (AH&PR) Court established under the Court's 1998 Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples Rights. The objective was to merge the ACH&PR with the Court of Justice, which was created under the Constitutive Act of the AU. This was done with the objective of creating one continental court for the AU.<sup>11</sup> However, the ACJ&HR Protocol is yet to come into force. Amendments expanding the jurisdiction and modifying the structure of the ACJ&HR, through an Amendment Protocol concluded in 2014, are also contextually discussed in the research.

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<sup>11</sup>See the Preamble to the Protocol <[https://au.int/sites/default/files/treaties/36396-treaty-0035\\_-\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36396-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf)> accessed on 30<sup>th</sup> January 2018.

Moreover, this research is an analysis of the current model of the ACJ&HR, as the envisaged AU single court, its structure and jurisdiction with regard to trade and investment dispute settlement, under the AU continental integration framework. The research establishes that the focus of the court and indeed emphasis of its protocols and statute afore-cited, is largely based on the human rights and international criminal law jurisdiction of the Court with little, if any, reference to economic, trade and investment disputes. The net effect of which is trade and investment disputes and their resolution/settlement are either peripherally dealt with or ignored all together.

Furthermore, this research seeks to address the lacunae identified by suggesting a holistic dispute settlement system under the AEC Treaty that encompasses methods of resolving the four types of disputes identified above.

This research establishes that the 34-year plan laid out in the AEC Treaty, provides that the AEC will be achieved by merging RECs in Africa. However, no effort to merge or assimilate judicial and dispute resolution structures created and developed by RECs in Africa, has been given effect by the various protocols that establish or attend the ACJ&HR. The jurisdiction and structure of the ACJ&HR court with respect to trade and investment disputes also seems to be absent. There is, however, an apparent disconnect in the development of a unified continental AU dispute resolution mechanism with the economic integration plan under the AEC Treaty. Therefore, as the economic integration of the continent gains pace, a concomitant development of trade and investments disputes resolution mechanism to attend to this development is yet to be prioritised by the AU. Instead, the AU is only keen on developing a judicial system that focuses largely on human rights and international criminal law.

It is argued in this research, that for the AEC to be successfully realised, the continent's economic integration process must be supported by a well-structured, resourced and all-encompassing dispute resolution system. It is, therefore, proposed in this research, that far reaching amendments, to the ACJ&HR Protocol and Statute, provide for an expanded mandate of the Court, through the creation of a special unit/section or chamber to deal with trade and investment disputes. Furthermore, the research proposes that the jurisdiction of this chamber should be formulated to

deal with member state trade disputes, AEC organs of member state disputes, state investor disputes, and transnational investment disputes within the AEC. The jurisdiction of the court should, therefore, also be expanded to include non-state parties and individuals, natural or corporate, by enforcing treaties, protocols or contractual rights within the AEC context.

## **1.2 Research Questions**

The research fundamentally seeks to answer these questions:

- (i) What is the role of the ACJ&HR as the unified single AU court in the resolution of trade and investment disputes and the realisation of the continental economic community?
- (ii) Is the dispute resolution mechanism comprised in the ACJ&HR adequate in addressing the potential trade and investment disputes that may arise under the AEC?
- (iii) Is there a need for a special chamber/section and an expanded spectrum of dispute resolution mechanisms to involve arbitration, mediation and conciliation, under the court?
- (iv) If so, what would be the nature, functions and structure of such special chamber/section?

## **1.3 Significance and Objectives of the Research**

The research sets out to achieve the following:

- (i) To examine the dispute resolution mechanism availed through the AU single court, and to establish whether the same addresses the resolution of potential trade and investment disputes under the AEC treaty.



- (ii) To assess the viability of expansion of the jurisdiction of the AU single court to include the settlement of trade and investment disputes envisaged under the AEC treaty.
- (iii) To advance the case for a special chamber/section and an expanded spectrum of dispute resolution mechanisms to involve arbitration, mediation and conciliation, under the court.
- (iv) To use comparative law to model an appropriate structure of an expanded and devolved trade and investment chamber of the ACJ&HR.

An examination of the jurisdiction and remit of the ACJ&HR will form the substratum of the first part of this research. An interrogation of Article 28 of the Statute of the ACJ&HR will, therefore, be necessary. Moreover, an expanded jurisdictional mandate of the AU single court to include resolution of trade and investment disputes will be justified.

Firstly, this research will underscore that trade and investment operate most effectively within jurisdictions with predictable, independent, impartial and efficient dispute resolution mechanisms. An effective and holistic mechanism for the settlement of trade and investment disputes is critical for the deepening of the integration process. Fair, efficient, expeditious, reliable and competent dispute resolution methods, assure state parties, investors, third states and trading citizens of member states, of the reliability of the AfCFTA and AEC. Confidence is therefore infused in the AEC rules of engagement, tariffs and tax regimes. In addition, foreign direct and intra-community trade and investments shall follow. Accordingly, the World Trade Organisation (WTO) Guidelines on Regional Integration recognise that an effective and efficient dispute resolution system is imperative for the proper functioning of a REC.<sup>12</sup>

The second aspect of this thesis delves into a consideration of the instruments available to the ACJ&HR; and whether the same underwrite trade and investment dispute settlement under the AEC. The point of commencement is the Charter of the United Nations (UN) and the AU Treaty,

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<sup>12</sup> Article XXIV 1994 GATT/WTO Agreement

<[https://www.wto.org/english/tratop\\_e/region\\_e/region\\_art24\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_art24_e.htm)> accessed on 28<sup>th</sup> February, 2018.

which underscore the commitment of member states to settling disputes by peaceful means.<sup>13</sup> These include trade and investment disputes. On the international plane, international tribunals/courts, mediation, conciliation and arbitration are the primary methods of settling disputes among states, third parties and investors *inter se*.<sup>14</sup> The thesis will therefore seek to justify an expanded array or spectrum of dispute resolution mechanisms which are deemed useful to the resolution of trade and investment disputes in an integrated Africa.

Coupled with the aforementioned objectives, this research will highlight how international economic law has over time developed a body of law complete with its own unique dispute resolution mechanisms, with international commercial arbitration as its significant feature.<sup>15</sup> Arbitration has been found to be most suitable for investment disputes between states and investors with regards to private international contracts/transactions, treaty based transactions/contracts and disputes related thereto.<sup>16</sup>

Mediation, negotiation and conciliation, on the other hand, have found use mostly in political disputes including trade disputes pitting states and more particularly on interpretation, application, observance and implementation of treaty obligations.<sup>17</sup> Mediation, negotiation and conciliation are preferred over adversarial court or arbitral tribunal proceedings. These non-adversarial methods of dispute resolution are useful in resolving or managing trade disputes between states. This is largely because they involve negotiations with the facilitation of neutral experts and often ensure relationships endure the dispute, rather than fracturing or completely severing relations between states.

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<sup>13</sup> Article 2(1) and 33 of the Charter of the UN; Article 4 (e) of the AU Act.

<sup>14</sup> MF Hollering, "Alternative Dispute Resolution and International Trade" (1986) 14 *N.Y.U Rev. L. & Soc. Change* 785. Also see Article 33 of the Charter of the UN, available at <<https://www.un.org/securitycouncil/content/pacific-settlement-disputes-chapter-vi-un-charter>> accessed on 30<sup>th</sup> January 2019.

<sup>15</sup> AS Sweet, "The New Lex Mercatoria and Transnational Governance" (2000) 13 *Journal of European Public Policy* 627-646. MF Hoellering MF, [n14] 785.

<sup>16</sup> *Ibid* 628-630. See also, H Booyesen, "International Law as a Legal System; the Quest for a Private Law Leg" (1996) 21 *SAYIL* 60.

<sup>17</sup> *ibid*.

Further, the thesis will analyse the structure of the dispute resolution mechanism availed by the ACJ&HR to determine its efficacy in the settlement of trade and investment disputes. The first section of the thesis will recommend an inbuilt appellate mechanism in the court's structure. As it is, the ACJ&HR is a centralised court without branches or without presence in the regions of Africa. It will be proposed that the structures of existing RECs be maintained at the sub-regional level with the objective of devolving the functions of the ACJ&HR. This will not only ensure a harmonised approach, but will also ensure effective, expedient disposal of disputes. It will also allow the court to leverage on the existing structures developed by RECs instead of winding them up. This will allow for the benefits of the continental economic integration to be seen and felt in all corners of the continent. It will also allow for an overall avoidance of waste of physical infrastructure, as well as human resource capacity, built by RECs, throughout the last six decades, as part of sub-regional integration efforts by independent African states.

The research also addresses the decentralisation and devolution of the ACJ&HR as a means of achieving access to trade and investment justice in the context of the AEC. The 40-year journey towards the AEC is meant to benefit from vital lessons drawn from experiences of the RECs, which the AU intends to eventually consolidate and collapse into the AEC. These experiences invariably include attempts at establishing both supranational and inter-governmental institutions at sub-regional levels on the African continent. African RECs have established, at the sub-regional level, courts, tribunals, arbitration and mediation centres as part of their own integration process. The East African Community (EAC) has created the East African Court of Justice (EACJ). The Southern African Development Community (SADC) has established a tribunal. ECOWAS has established a Court of Justice. The Common Market for Eastern and Southern Africa (COMESA) has established a court of Justice with jurisdiction to employ arbitration. The Intergovernmental Agreement on Development (IGAD) has an arbitration centre, which also focuses on mediation in peace and conflict management. The thesis will, therefore, draw from the experiences gained by these sub-regional RECs, in dispute resolution, which include the establishment of permanent and ad hoc courts, tribunals and other dispute settlement bodies.

It is also intended, through this research, to develop a multi-door, multifaceted dispute resolution mechanism. This mechanism proposed is to offer litigation in the traditional court set up, international commercial arbitration, as well as in mediation and conciliation; each being suited for a specific nature of dispute, all under the aegis of the ACJ&HR. For instance, mediation and conciliation, which are useful for resolving state-state, or state-community disputes, based on obligations under the AEC Treaty, are proposed. International commercial arbitration, which is most suitable for resolution of commercial and investment disputes, based on treaty rights and cross border transactions between member states' citizens and which, therefore, cannot be the subject of national courts, is also proposed. The research will, therefore, gravitate towards an expanded dispute resolution spectrum, beyond what is currently offered by the ACJ&HR.

The conclusions drawn and the propositions proffered, in answer to the research questions posed, bear economic and social justifications. In 2018, Africa's combined Gross Domestic Product (GDP) stood at US Dollars 2.5 trillion with a potential market of 1.2 billion people.<sup>18</sup> Intra-Africa trade currently accounts for between 17%-23% of the trade on the continent.<sup>19</sup> It is estimated that inter-Africa trade, under the AfCFTA, will account for an increase by up to 52.3% of all the trade in Africa by 2022.<sup>20</sup> Intra Africa trade in industrial goods is projected to grow by US \$60 billion annually.<sup>21</sup> In 2018, Foreign Direct Investment (FDI) into Africa rose to US Dollars 46 billion in 2018 representing an 11% increase from the previous year.<sup>22</sup> Foreign direct investors and traders are attracted to regions with an efficient and effective dispute resolution infrastructure. One of the core objectives of integration and indeed the drivers of the economic integration of Africa,

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<sup>18</sup> African Export-Import Bank (2018) *African Trade Report*, <<https://s3-eu-west-1.amazonaws.com/demo2.opus.ee/afrexim/African-Trade-Report-2018.pdf>> accessed on 14<sup>th</sup> August 2019, 78.

<sup>19</sup> Africa Trade Statistics Yearbook 2018 <<https://www.uneca.org/publications/african-statistical-yearbook-2018>> accessed on 14<sup>th</sup> August 2019. See also, similar statistics by the World Trade Statistical Review 2018, <[https://www.wto.org/english/res\\_e/statistics/wts2018/wts18\\_toc\\_e.htm](https://www.wto.org/english/res_e/statistics/wts2018/wts18_toc_e.htm)> accessed on 14<sup>th</sup> August 2019. UNECA Economic Report on Africa 2019 <[https://www.uneca.org/sites/default/files/PublicationFiles/era2019\\_eng\\_fin.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/era2019_eng_fin.pdf)> accessed on 14<sup>th</sup> August 2019.

<sup>20</sup> African Export-Import Bank, (n)18, 80.

<sup>21</sup> *ibid.*

<sup>22</sup> United Nations Conference on Trade and Development (UNCTAD) World Investment Report (2019) <[https://unctad.org/en/PublicationsLibrary/wir2019\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf)> accessed on 14<sup>th</sup> August 201, 1

includes the quest for larger FDI and the deepening of intra–African trade. This is only possible with the assurance or guarantee that comes with a reliable and efficacious dispute resolution mechanism.

This research breaks new ground and ventures into the nascent area of continental economic integration of Africa. It addresses the economic integration of the African continent under the AEC Treaty and AfCFTA Agreement, in the limited context of dispute resolution. The research and the proposals emanating therefrom are aimed at enhancing the African integration process through proposing an effective, broad-based, devolved and effective dispute resolution mechanism that can spur intra-African trade and foreign investment.

#### **1.4 Methodology**

The research shall primarily entail reviewed literature and desktop internet research. This will include books, journals, and peer reviewed articles, data collected and analysed by such bodies as the AU, COMESA, EAC, ECOWAS, UNECA, EU and the WTO. Comparative perspectives offered from continental integration efforts, such as the European Union (EU), will also be employed. Although statistics and empirical data are cited in support of prepositions made, the research is largely theoretical. A socio-legal approach is adopted.

#### **1.5 Hypotheses**

- (i) **That** the ACJ&HR is the principal dispute resolution mechanism established as the single AU court and is charged with the mandate of determining disputes between member states *inter se*, citizens of member states to the establishing protocol and the AU organs; with respect to the AU Act, charters, treaties, protocols and decisions of its organs.
- (ii) **That** the dispute resolution mechanism comprised in the single AU court is inadequate in dealing with trade and investments disputes anticipated in the AEC treaty in general, and Africa’s economic integration in particular.

- (iii) **That** an expansion of the ACJ&HR to incorporate international commercial arbitration, mediation and conciliation will deepen continental regional integration by providing a holistic and effective system that resolves both trade and investment disputes.
- (iv) **That** a devolved continental dispute resolution system will not only ensure the structures developed by sub-regional RECs in Africa are put to good use after the full realisation of the AEC, but will also ensure access to justice by all Africans in every corner of the continent.

## 1.6. Literature Review

This thesis is in essence a study of African continental economic regionalism and dispute resolution. A review of key literature in respect to these concepts is, therefore, briefly undertaken in this part.

Bachinger and Hough advance that the concept of “New Regionalism” is a new phenomenon or trend that has since gained currency in Africa in place of the hitherto “Regionalism”.<sup>23</sup> They observe that this phenomenon came to the fore in the 1990s and is principally characterised by an overlapping or duplicity in membership of regional organisations by African states.<sup>24</sup> They identify reasons for the “New Regionalism” as globalisation and political objectives within the context of geo-economic politics.<sup>25</sup> They further note that the phenomenon of “New Regionalism” is not unique to Africa but can also be seen to feature in Eastern and Central Europe, and states of the former Soviet Union.<sup>26</sup> They argue that though undesirable, the proliferation of RECs is not entirely in disharmony with the World Trade Organisation (WTO) General Agreements on Trade and Tariffs (GATTs 1994) prescriptions on regional integration.<sup>27</sup>

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<sup>23</sup> K Bachinger and J Hough, “New Regionalism in Africa; Waves of Integration” (2009) 32(2) *Africa Insight* 43-59 [43].

<sup>24</sup> *ibid*, 44

<sup>25</sup> *ibid*, 46.

<sup>26</sup> *ibid*, 44.

<sup>27</sup> *ibid*, 46.

They categorise the 1960s proliferation of Regional Integration Arrangements/Agreements (RIAs) as the “first wave of Regional Integration”.<sup>28</sup> The second wave emerged in the mid-1990s and was known as the “New Regionalism”.<sup>29</sup> They conclude that the latest “wave towards numerous trade blocs”, from the year 2000, has resulted in confusion and that this phenomenon is one of the barriers to effective regional integration.<sup>30</sup>

The views expressed by Bachinger and Hough are accurate in so far as they analyse the concept of regionalism and how it manifested itself in the two eras/epochs in the post-colonial Africa. They paint a grim picture of regionalism as having failed to advance Africa’s integration goals due to economic and political reasons.<sup>31</sup> Trade fragmentation is, therefore, seen as antithetical to development. By advancing that a multiplicity of RECs in Africa, poor infrastructure, high poverty levels and low GDP levels hinder the continent from harvesting the fruits of integration, the authors seem to covertly make a case for the consolidation of markets into larger, more viable entities such as the AEC, which subject forms the substratum of this research. Bachinger and Hough’s views are, therefore, useful in aiding in the appreciating and appraising of the concepts of “Regionalism” and “New Regionalism” in the context of Africa’s integration, concepts that are germane to this thesis.

Fagbayibo conducts an analysis of the various attempts at the creation of supranational institutions in Africa either through regional economic blocs or federated unions.<sup>32</sup> He describes supranationalism as the existence of an organisation capable of exercising authoritative powers over its member states.<sup>33</sup> He sees elements of supranationalism in the integration efforts in Africa such as the EAC, the ECOWAS and the OHADA.<sup>34</sup> He also illuminates the factors bedevilling the

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<sup>28</sup>ibid, 47.

<sup>29</sup>ibid, 51.

<sup>30</sup>ibid 47.

<sup>31</sup>ibid 48-49.

<sup>32</sup> B Fagbayibo, “Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview” (2013) 16 1 *PER/PELJ* 32-69.

<sup>33</sup>ibid 33.

<sup>34</sup>ibid 35-47.

attempts at supranationalism in Africa. These include: weak institutional machinery, the non-implementation of key integration initiatives, crowded integration landscape, skewed distribution of benefits, hegemonic threats, political instability and democratic deficit.<sup>35</sup> There is convergence between Fagbayibo, and Bachinger and Hough that weak institutional mechanisms, monitoring and enforcement of integration objective have limited the effectiveness of RECs in Africa.<sup>36</sup>

The problems identified by Fagbayibo are the possible ones that might affect the integration process under the AEC. Fagbayibo's article is useful in setting the theoretical context of the research, particularly on the supranational approach to regionalism in Africa and the successes and failures recorded. The solutions he suggests provide useful insights into the possible ways to surmount such problems.

Draper explores the models of regional economic integration and dispute resolution applied in Africa and concludes that most take after or are inspired by the European Union model with a supranational approach.<sup>37</sup> The author revisits the unique circumstances attending African markets and the economics of integration of African states.<sup>38</sup> He concludes that a home grown inter-governmental approach to regional integration as opposed to a supranational approach is most suited to surmount the various challenges that afflict the African continent.<sup>39</sup> Draper proposes a *sui generis* dispute settlement system that is inspired by experiences drawn from African RECs over the last 60 years.<sup>40</sup> He shines light on the pitfalls that have attended the "imported" European integration model adopted in Africa.<sup>41</sup> These, he identifies as including fundamental ideological, cultural, social and economic differences between Africa and Europe explain why the

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<sup>35</sup>ibid 47-58.

<sup>36</sup> See, K Bachinger and J Hough (n) 23 49.

<sup>37</sup> P Draper, "A Home-grown Approach to Regional Economic Integration in Africa: Thinking outside the European Box" (2011) 10(4) *Trade Negotiations Insight* <<https://www.ictsd.org/bridges-news/trade-negotiations-insights/news/a-home-grown-approach-to-regional-economic-integration>> accessed on 14<sup>th</sup> August 2019 1. Similar views are expressed by K Bachinger and J Hough, (23) 49.

<sup>38</sup>ibid.

<sup>39</sup>ibid 5.

<sup>40</sup>ibid.

<sup>41</sup>ibid, 4-5.



supranational EU model has not been entirely successful in Africa.<sup>42</sup> He, therefore, suggests an intergovernmental approach based on the unique African dispute settlement culture as a viable preposition to avoid the challenges posed by the cut-and –paste of the EU dispute settlement approach that has been prevalent on the continent for decades.<sup>43</sup>

While Draper recommends the use of an inter-governmental other than supranational approach to integration in Africa, this thesis will advance that a hybrid of both will suffice for Africa. For dispute resolution, the research will propound that a coercive mandate of the continental court is crucial for its efficacy and observance of the its decisions by parties who fall under its jurisdiction. It is underscored that to leave the observance of decisions of courts to individuals’, organs of the REC or state parties’ whims will ultimately undermine the authority and independence of the system, and effectively lead to non-observance of treaty and other legal obligations. This factor can quicken the failure of the entire AEC project.

Frimpong argues that African regional courts remain largely under-studied from an academic perspective.<sup>44</sup> He attributes this factor to courts’ low contribution to the jurisprudence of international law in general, international human rights law and regional integration law.<sup>45</sup> He also observes that the regional courts face concerns over their legitimacy or their right to adjudicate over disputes.<sup>46</sup> He sees the legitimacy of the courts as being affected by the manner of their creation (mostly through multilateral agreements between states); the perception that regional courts encroach on the member states’ exercise of sovereignty; limited access by juristic and natural persons to the courts; transparency of their processes; the extent or limits of their jurisdiction; and their rules of procedure.<sup>47</sup>

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<sup>42</sup>ibid.

<sup>43</sup>ibid.

<sup>44</sup>RO Frimpong, “Legitimacy of Regional Economic Integration Courts in Africa” (2014) 7 *African Journal of Legal Studies* 61-85, also 62-63.

<sup>45</sup>ibid, 62-63.

<sup>46</sup>ibid, 63-64.

<sup>47</sup>ibid, 64-84.

This thesis addresses the propriety of a continental trade and investment dispute settlement system within the AU single court system. The challenges of legitimacy identified by Frimpong form some of the weaknesses that attend the current system and for which an appropriate supranational system should be fashioned.

Cofelice notes that AfCFTA's success will largely depend on the establishment of appropriate governance structures which promote harmonisation, consistency and predictability of its goals.<sup>48</sup> He acknowledges the role of an effective dispute settlement framework in the eventual success of the AfCFTA project.<sup>49</sup> He, therefore, suggests that the AfCFTA's institutional architecture should adopt a "multi-level" character, and be supported by sub-regional and national institutions.<sup>50</sup> He observes that the AfCFTA's principal challenge will be its ability to rationalise and harmonise the different, and sometimes conflicting, regimes of African RECs within the time lines set in the AfCFTA Agreement.<sup>51</sup>

Cofelice appreciates that the current dispute settlement model adopted by the AfCFTA is exclusively intergovernmental. He, therefore, proposes a dispute resolution framework which is mandatory and binding on member states.<sup>52</sup> The framework, he suggests, should also explicitly recognise the possibility of individuals to assert their rights under the Agreement.<sup>53</sup> He proposes that the complaints process should include appeals from national courts and RECs, with the ACJ&HR as the apex court of last resort.<sup>54</sup> He further proposes the establishment of a trade chamber of the ACJ&HR "with a view to creating positive synergies between trade law and human rights."<sup>55</sup>

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<sup>48</sup>A Cofelice, "African Continental Free Trade Area: Opportunities and Challenges" (2018)3 *The Federalist Debate* (Walter De Gruyter, Berlin) 32-35, also 33.

<sup>49</sup>*ibid.*

<sup>50</sup>*ibid.* 34.

<sup>51</sup>*ibid.* 33.

<sup>52</sup>*ibid.* 34.

<sup>53</sup>*ibid.*

<sup>54</sup>*ibid.*

<sup>55</sup>*ibid.*

Cofelice's work illustrates the importance of a structurally sound, accessible continental trade and investment dispute resolution system in achieving the free trade area envisaged. It will, therefore, be useful in modelling an appropriate system under the African single court.

Onyema and Nyombi advocate for the creation of an African Commercial Court (ACC) and a Pan African Investment Court (PIC), respectively.<sup>56</sup> They both base their prepositions on what they perceive as being the weaknesses of the current commercial and investor-state arbitration. Chiefly, they see the system as lopsided against African states and investors.<sup>57</sup> They also observe that despite significant contribution to the international arbitration case-load, the current international arbitration system still largely excludes African arbitrators and practitioners, hence stunting the growth of African arbitrators, and arbitration in general.<sup>58</sup>

While their sentiments may sound attractive in general terms, they fall short on merit when viewed objectively. Firstly, the proposals do not anchor the proposed courts on any multilateral treaty or protocol framework, not even within the AU system. This omission does not take into account the normative position and conceptual reality that continental economic integration is only capable of being achieved under the AU framework. As a result, ready acceptance of the proposals by African governments becomes doubtful. Secondly, the proposals do not explain the fate, status or relationship between the proposed courts and the existing continental, regional, and even domestic courts in terms of both normative and hierarchical supremacy order. These are important matters which must be addressed if the proposals are to have any meaningful effect. The proposals also fall short of addressing other critical elements such as: the manner of appointment of judges

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<sup>56</sup> See, C Nyombi, "A Case for a Regional Investment Court in Africa" (2018) 43(1) *North Carolina Journal of International Law* 67-96. E Onyema, "Reimagining the Framework for resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement" (2010) *World Trade Review* 1-23. See also, similar views in C Nyombi, and T Mortimer, "Rebalancing International Investment Agreements in favour of Host States: Towards a World Investment Court" (2019) 3 *Journal of Business Law* 200-222. C Nyombi, "Towards a New World Economic Order: Proposal for a Pan-African Investment Court?" as referenced in Emilia Onyema (ed), "Rethinking the Role of African National Courts in Arbitration" (2018) *Kluwer Law International* ISBN:9789041190420.

<sup>57</sup>Onyema (n)56, 16. Nyombi (n) 56, 87-90.

<sup>58</sup>ibid.

to the courts, financing and enforcement of decisions of the proposed courts. Thirdly, both proposals address only one aspect of economic integration: investment disputes. Yet, trade and investment disputes go hand in hand, and at times may overlap. While both may be separate normatively they enjoy significant overlaps which make it rational for a single AU court to undertake jurisdiction for both of them.

Alter, Gathii and Helfer explore the pattern of backlashes towards regional courts by member states in the three prominent sub-regional RECs of the EAC, SADC and ECOWAS.<sup>59</sup> They observe that the backlash takes three forms: the restriction of the jurisdiction of the court, attempts at abolishing the courts and removal of the judges of the courts.<sup>60</sup> Other forms of backlash include administrative or even treaty amendments to circumvent the effect of the courts' decision, or outright defiance of the decisions of the courts. Some states have purported to withdraw from protocols establishing the courts. They note that the trend of backlashes through extra-judicial political influences, pose an existential threat to the sub-regional courts.<sup>61</sup> Despite this hostility, they note that sub-regional courts, such as the EACJ, remain "stubbornly independent".<sup>62</sup>

The creation of truly independent regional courts is critical to the envisaged continental integration of Africa. The experiences highlighted by Alter, Gathii and Helfer form the substratum of the discourse in this thesis. The work, therefore, offers invaluable insights into the possible

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<sup>59</sup> K Alter, J Gathii, and L Helfer, "Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences" (2016) 27 *European Journal of International Law* 293-328.

<sup>60</sup> In West Africa, the Court of Justice, of the ECOWAS upheld allegations of torture, by opposition journalists, in Gambia whereby the country's political leaders sought to restrict the Court's power to review human rights complaints. Other member states ultimately defeated Gambia's proposal. In East Africa, Kenya failed in its efforts to abolish the East African Court of Justice (EACJ) or to remove some of its judges after a decision challenging an election to the sub-regional legislature. However, member states agreed to restructure the EACJ in ways that has significantly affected the Court's subsequent trajectory. In Southern Africa, after the Southern African Development Community (SADC) Tribunal ruled in favour of white farmers, in disputes over land seizures, Zimbabwe prevailed upon other SADC member states to suspend the Tribunal and strip its power to review complaints from private litigants. See Alter, J Gathii, and L Helfer, (n) 59, 293-314.

<sup>61</sup> *ibid*, 328.

<sup>62</sup> *ibid*, 328.

politico-legal challenges that may afflict the continental trade and investment system under review. It is the objective of this research to fashion a continental trade and investment dispute settlement system that is insulated from political, extra-judicial and extra-legal bureaucratic/ administrative interferences.

This thesis ultimately advances the case for economic integration through the law, anchored in an overarching supranational continental court system. Comparative law and literature therefore offers invaluable insights in this regard. Cappelletti, Seccombe and Weiler conclude, in the context of the development of EU community law, that “integration is fundamentally a political process” and law is but one of the many instruments” that are harnessed to achieve the objectives of integration.<sup>63</sup> The three writers conceived what is now referred to as the “integration through law project”.<sup>64</sup> The project has acquired an enduring significance and played a pivotal role in shaping the contours of European law as an academic discipline.<sup>65</sup> In this regard, law is seen as both an object and an agent of integration.<sup>66</sup> While law is a product of the polity, the polity is also, to some extent, acknowledged to be a creature of the law.<sup>67</sup> As Hallstein observes, what makes the

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<sup>63</sup>Cappelletti M, et.al, “Integration Through Law: Europe and the America Federal Experience” (1986) (1)1, in Cappelletti M, et.al (eds), *Integration Through Law* (Walter de Gruyter Inc., Berlin) 3-4.

<sup>64</sup> The integration through law project refers to the ensuing body of scholarly work inspired by the pioneering work of M Cappelletti et.al, aforementioned, which addresses the various perspectives of the role of the law and legal systems in integration. Other prominent writings in this area include: J Hunt and J Shaw, “Fairy Tale of Luxembourg? Reflections on the Law and Legal Scholarship in European Integration” (2009) in D Phinnemore and Warleigh A (eds), *Reflections on European Integration: 50 Years of the Treaty of Rome* 93; M Selmayr, “The Foundation of a European Law Institute: The Planting of a Little ‘Apple Tree’ for a European Legal Culture” (2011) <[https://www.europeanlawinstitute.eu/file\\_admin/user\\_upload/p\\_eli/3\\_Martin\\_Selmayr.pdf](https://www.europeanlawinstitute.eu/file_admin/user_upload/p_eli/3_Martin_Selmayr.pdf)> accessed on 2<sup>nd</sup> August 2019; D Augenstein, *Integration through the Law” Revisited. The Making of the European Polity* (Ashgate Farnham 2012); and A Grimm, “The Uniting of Europe by Transclusion: Understanding the Contextual Conditions of Integration Through Law” (2014) 36 (6) *Journal of European Integration* 1.

<sup>65</sup> D Augenstein, “Integration Through Law” *Encyclopaedia of the Philosophy of Law and Social Philosophy* (Springer Science+Business Media B.V Berlin 2017) 1-5 [1].

<sup>66</sup>ibid. See also, R Delhousse, and JHH Weiler, “The Legal Dimension”, *The Dynamics of European Integration* (W. Wallace ed. London 1990) 242-260 [243].

<sup>67</sup>ibid.

European Community a remarkable legal phenomenon is that it is a creation of law; it is a source of law; and it is a legal system.<sup>68</sup>

The law is incomplete without a legal system through which it exerts its influence on the integration unit and its membership. Supranational courts play this critical role. They assure observance, interpretation and enforcement of international norms and shared values. However, to do so they must be fitted with the necessary accessories. For example, the CJEU's supremacy over national law and its direct effect have been identified as the critical elements that ensure the standardisation and elimination of differential treatment with the effect of deepening integration in the EU.<sup>69</sup> Augenstein underscores the CJEU's contribution and role in the integration of the EU as constitutionalising European law by endowing it with a claim to supremacy and direct effect.<sup>70</sup> As a result, EU law is supreme in relation to conflicting norms of national (constitutional law) and can be directly invoked by private parties in legal proceedings before national courts.<sup>71</sup> The CJEU has, therefore, laid the foundations of a supranational legal order that transcended the state-based constitutional international law divide and challenged traditional assumptions about the derivative relationship between positive law and the state.<sup>72</sup>

According to Cappelletti, Secombe and Weiler, the true measure of the success of legal integration is not whether the integrated legal system is technically sound and functional, but whether the system actually promotes the achievement of the integrational objectives.<sup>73</sup>

Therefore, the true test of the effectiveness of the proposed African continental trade and investment legal system is not necessarily in the technical soundness of the system but on whether it will promote the achievement of the objectives of the desired continental economic integration.

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<sup>68</sup> W Hallstein, *Europe in the Making* (Harvard University Press, Cambridge 1972) 30.

<sup>69</sup> D Augenstein, (n) 65, 1-2.

<sup>70</sup> D Augenstein D, (n) 65, 2.

<sup>71</sup> *ibid.*

<sup>72</sup> *Ibid.*, 2. See also Dickson J, and Eleftheriadis P (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, Oxford 2012) 25-40.

<sup>73</sup> Cappelletti, Secombe M, and Weiler JHH, (n) 63, 42.

## **1.7 Outline of Thesis**

This thesis comprises of six chapters. The first chapter contains the background to the research problem, the research questions, and objectives of the study, the methodology, hypothesis, a literature review and an outline of the chapters of the thesis.

Chapter two provides the conceptual framework of the study. The concepts germane to the study, their frontiers and contours are defined, so as to give the research both form and focus. Regional economic integration in the African context through the three historical epochs of integration from the 1960s to date are delineated. The first, second and third waves of integration, their motivation, challenges and achievements are discussed. Political, economic, social and cultural rationales for regional integration in the African context are also addressed. Chapter two of the thesis also briefly illuminates the four approaches to regional economic integration as applied in the African context, salient features thereof and the challenges and prospects attending the four approaches. The four approaches to be discussed include intergovernmental, supranational, functionalism and neo-functionalism. The chapter concludes by narrowing the discussion, at a theoretical level, to the interplay between continental economic integration and dispute resolution.

Chapter three develops the discourse to specific aspects of regional economic integration in Africa and addresses the various efforts by African states in economic integration. The architecture, scope, mandate and objects of the various continental and sub-regional efforts at economic integration, with particular reference to trade and investment integration, such as the AEC, AfCFTA, TFTA, COMESA, ECOWAS and SADC, are addressed in this chapter of the thesis.

Chapter four narrows down the focus of the research to dispute resolution under the AEC. The chapter begins by setting out the structure and jurisdiction of the envisaged ACJ&HR before tracing the evolution and development of the AU single court from the ACJ through the ACH&PR to the ACJ&HR. The dispute resolution mechanism setup in the AfCFTA and other African sub-regional economic integration arrangements such as the TFTA, COMESA Court of Justice, OHADA CCJA, EACJ, ECOWAS Court of Justice, SADC Tribunal, and the IGAD tribunal are

also illuminated. African regional arbitration and mediation centres are as well given attention as efforts for investment disputes resolution at the sub-regional level.

Chapter five of the thesis advances a case for the expansion of the jurisdiction of the ACJ&HR. To this end, in this chapter, the research will make a case for the creation of the chamber/section of the Court specific for resolution of trade and investment disputes. The chapter will also dedicate a section thereof to justifying the inclusion of arbitration, mediation and conciliation in the breath of instruments available to the proposed chamber of the court for settlement of trade and investment disputes. The chapter will also focus on the jurisdiction and structure of the proposed chamber of the court dedicated to trade and investment disputes. A proposal will be advanced to devolve the functions of the ACJ&HR to the sub regions occupied by the RECs so as to ensure access to trade and investment justice throughout the continent. This is in line with Article 6 of the AEC, which requires the AEC to build on the structures and experiences of sub regional RECs in the achievement of the AEC. An appellate mechanism inbuilt in the court system will also be suggested for purpose of efficiency, judicial review and final recourse.

Chapter six will highlight, collate and consolidate the conclusions drawn from the various chapters of the thesis with recommendations ultimately postulated.



## CHAPTER TWO

### CONCEPTUAL FRAMEWORK AND BACKGROUND TO REGIONAL ECONOMIC INTEGRATION IN AFRICA

#### 2.1 Introduction

Although the objectives of free trade are patently and largely economic, its pillars are latently political.<sup>74</sup> Free trade, of necessity, involves the giving up of some sovereign authority exercised by states over their territories. However, the proponents of free trade and economic integration, particularly of markets, opine that the loss of some sovereign authority by states is well compensated by the benefits that accrue to the state because of integration.<sup>75</sup> In essence, the benefits of integrated economies compensate for the loss of some sovereignty by the integrating states. Put differently, sovereignty is not lost by integration but is shared and possibly even expanded in an integrated system. The political good-will of sovereigns and governments who wield state power, therefore, forms a cardinal enabler of integration, be it economic or political.

This chapter sets a basis for the thesis by defining the fundamental concepts employed in this work. The chapter will offer an understanding of regional economic integration as a concept. Its objectives, rationale and classification of integration efforts, are all navigated through, at a theoretical level. Additionally, this chapter forms the foundation for discussing regional economic integration efforts in Africa, and, therefore, the evolution of the ACJ&HR as the AU single court, which is the substance of the chapter three of this thesis.

This chapter consists of five substantive parts. The first section attempts a definition of economic regionalism through its fundamental elements and salient objectives. The second section identifies the main theories for regional economic integration as applied in Africa. The third section addresses the various forms of international dispute resolution preferred in resolving trade

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<sup>74</sup>HCAW Schulze, *International Tax Free Zones and Free Ports* (Butterworths, Durban 1997) 1.

<sup>75</sup> See, for example, P De Lombaerde and L Van Langenhove, "Regional Integration: Poverty and Social Policy" (2003) 7(3) *Global Social Policy* 377-383; H Van Ginkel, and L Van Langenhove, "Introduction and context" (2007) in H Van Ginkel, J Court and L Van Langenhove (eds), *Integrating Africa; Perspectives on Regional Integration and Development*, UNU Press 1-9.

and investment disputes. Most importantly, it addresses the factors that affect the choice of dispute resolution within the African context. The fourth section examines economic regionalism in Africa and how it manifests, both at the continental/regional and sub-regional levels. Finally, the fifth section summarises the discussions set out in the chapter.

## **2.2 The Concept of Economic Regionalism**

Although the Charter of the United Nations (UN) does not specifically define regional integration, it, however, provides for international cooperation in solving, among others; economic, social, cultural and humanitarian problems as one of its key objectives.<sup>76</sup> Article 52(1) of the Charter of the UN makes the most direct reference to regional arrangements. It is worded in permissive terms and provides that:

[n]othing in the Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.<sup>77</sup>

Hass defines regional integration as:

the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over pre-existing national states; the result of which is a new political community, superimposed over pre-existing ones.<sup>78</sup>

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<sup>76</sup>Article 1(3). The full text of the Charter of the UN is available at <<https://www.un.org/en/charter-united-nations/>> accessed on 12<sup>th</sup> September 2018.

<sup>77</sup> *ibid.*

<sup>78</sup> E B Haas, *The Uniting of Europe: Political, Social and Economic Forces* (Stanford University Press, Stanford 1958) 16.

Van Ginkel and Van Langenhove give the term a more contemporary definition. They define regional integration as “the process by which states within a particular region increase their level of interaction with regard to economic, security, political or social and cultural issues”.<sup>79</sup>

According to Balassa, economic integration encompasses measures designed to abolish discrimination between economic units belonging to different nation states.<sup>80</sup> The fundamental attributes of economic integration are defined with reference to mobility of goods, services, factors of production and variable capacities for shared or supranational decision making and implementation.<sup>81</sup>

The objectives of integration are, primarily, twofold: economic and political.<sup>82</sup> Other motivations for integration have also emerged, albeit at a less prominent level. These include: social, cultural, technical and environmental and human rights objectives.<sup>83</sup> Integration, therefore, invariably attempts to answer to the integrating nations’ general economic welfare; and in the ultimate, global welfare.<sup>84</sup>

Conventional regional integration theory identifies at least six approaches to integration.<sup>85</sup> These include functionalism, neo-functionalism, intergovernmentalism, supranationalism,

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<sup>79</sup> H Van Ginkel and L Van Langenhove, (n) 75 9.

<sup>80</sup> B Balassa, *The Theory of Economic Integration* (George Allen & Unwin Ltd, London 1961) 1.

<sup>81</sup> M Forere, “Is a Discussion of the “United States of Africa” Premature? Analysis of ECOWAS and SADC Integration Efforts” (2012) *Journal of African Law* 29-54 [33].

<sup>82</sup> T Cottier and M Foltea, “Constitution and Function of the WTO and Regional Trade Agreements” in L Bartles, (2006) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, Oxford (2012) [1]: See also, C Phillipe. A Schmitler, “A Revised Theory of Regional Integration: Theory and Research” (1970) 24(4) 836-868.

<sup>83</sup> J Gathii, “Mission Creeper for Relevance: The East Africa Court of Justice’s Human Rights Strategy” (2013) 24 *Duke Journal of Corporate and International Law* 249-280, at 249. S Balton and R Balton (2007), observe that there is a direct co-relation between the observance of human rights and the attraction of Foreign Direct Investment; S Balton and R Balton, “What attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment” (2007) 96(1) *Journal of Politics* 96 (1) 143-155 [1].

<sup>84</sup> Schulze (n) 74.

<sup>85</sup> For a discussion of these theories; see, C Basak, *International Law for International Relations*. (OUP. Oxford, New York 2010) chapter 2.

liberalism and realism. For purposes of this thesis, and as far as it relates to economic integration of the African continent, a discussion of the three theories of intergovernmentalism, functionalism and supranationalism shall suffice in giving context to the study.

The World Trade Organisation (WTO) has classified integration models into at least six categories: Preferential Trade Areas (PTAs), Free Trade Areas (FTAs), Customs Unions, Common Markets, Monetary Unions, Economic Unions, and Political Unions.<sup>86</sup> The classification of integration models is based on the characteristics and objectives that typify them.<sup>87</sup> This step-wise classification is, therefore, informed by the objects of the particular integration effort. Some terminate after achieving their objectives, at the FTA level, some end at customs unions or common market, while others evolve to economic blocs or federated semi-autonomous political unions.<sup>88</sup> The stepwise or progressive evolution of integration units from PTAs or FTAs to political or economic unions is the most preferred approach applied in African economic and political integration processes. In terms of economic integration, this model is also called the linear market progression paradigm.<sup>89</sup>

### **2.3 Theories and Rationales of Regional Economic Integration in Africa**

A theoretical understanding of the approaches to regional economic integration in Africa is critical in setting context to the discourse on continental trade and investment dispute resolution. This section engages in, but is not limited to, a discussion on intergovernmentalism, functionalism and

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<sup>86</sup>Article XXIV of the WTO (GATT) 1994 which generally follows the models defined by Balassa, note 80 above. These theories have a multidisciplinary application cutting across international relations, international organisation, political science, and law. Mbori contends that the structure adopted for the AfCFTA makes it inevitable that it should comply with Article XXIV of GATT and Article V of GATS. See H Mbori, “Existing in the Eternal Twilight Zone of WTO Consistency: The Case of the African Continental Free Trade Agreement” (2019) [7] <http://www.afronomicslaw.org/2019/01/25/existing-in-the-eternal-twilight-zone-of-wto-consistency-the-case-of-the-africa-continental-free-trade-agreement/> accessed on 30<sup>th</sup> September 2019.

<sup>87</sup> Balassa (n)80 [2].

<sup>88</sup>UO Uzodike, “The Role of Regional Economic Communities in Africa’s Economic Integration, Prospects and Constraints” (2009) 39(2) *Africa Insight* 26-42 [5].

<sup>89</sup> T Hartzenberg, “Regional Integration in Africa” (2011) *Trade Centre for Southern Africa-WTO Working Paper* [5].

supranationalism, which are the three principal approaches to integration in Africa. While other theories exist, these three are of primary concern to this discourse since they are predominantly manifested in economic integration efforts in Africa necessitating their importance in this discussion.

### ***2.3.1 Theories of Regional Economic Integration in Africa***

#### ***2.3.1.1 Intergovernmentalism***

The emergence of intergovernmentalism as a theory can be traced back to the intellectual discourse on integration of the 1960s advanced by Hoffman.<sup>90</sup> It is essentially a critique of the neo-functionalism theory attributed to Haas.<sup>91</sup> Rosamond summarises the essence of intergovernmentalism by foregrounding how the theory is underpinned by the assertion that the state is the primary actor in international relations.<sup>92</sup> The state, therefore, consciously relinquishes a portion of its sovereign authority, in the interest of commonly shared objectives, with regards to the integration process.<sup>93</sup> However, the state still retains its place as the principal entity in the integration process.<sup>94</sup>

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<sup>90</sup> S Hoffmann, "Obstinate or Obsolete? The Fate of the Nation-state and the Case of Western Europe" (1966) 95(3) *Daedalus* 862-915.

<sup>91</sup> The neo-functional theory is elaborated in two of Haas' works, EB Haas "International Integration; the European and Universal Process" (1961) 15(3) *International Organisation* 366-392; and EB Haas, "The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorising" (1970) 24(4) *International Organisation*, 606-646.

<sup>92</sup>B Rosamond, "Conceptualising the EU Model of Governance in World Politics" (2005) [7] <[http://wrap.warwick.ac.uk/1098/1/WRAP\\_Rosamond\\_9570885-150709-rosamond\\_efar\\_05.pdf](http://wrap.warwick.ac.uk/1098/1/WRAP_Rosamond_9570885-150709-rosamond_efar_05.pdf)> accessed on 15<sup>th</sup> December 2018. See also B Rosamond, "The Uniting of Europe and the foundation of EU studies: Revisiting the neo-functionalism of Ernst Haas" (2005) 12(20) *Journal of European Public Policy* 291-309.

<sup>93</sup>B Rosamond, *Theories of European Integration* (Palgrave Macmillan, Hampshire 2000) 51-52. See also, S Hoffman, "Reflections on the Nation-State in Western Europe Today" (1982) 20(1-2) *Journal of Common Market Studies* 20 21-37.

<sup>94</sup>ibid.

Intergovernmentalists argue that the state does not become obsolete because of integration but rather remains a primary actor in the integration process through negotiation and direction.<sup>95</sup> Therefore, the state is not weakened through delegating a portion of its powers to the integrated unit but, to the contrary, is strengthened in the process by expanding its sphere of influence beyond its territory.<sup>96</sup>

A contemporary version of intergovernmentalism has since emerged, with its main proponents described by Andrew Moravcsik as liberal intergovernmentalists.<sup>97</sup> The fundamentals of the theory remain the same as with classical intergovernmentalism, with states prevailing as the central actors in integration. However, it should be highlighted that, liberal intergovernmentalism incorporates the liberal model of integration into traditional notions of intergovernmentalism. This model underscores the role of the state in asserting its preferences and pursuing them through its bargaining powers.<sup>98</sup> In contrast to neo-functionalists, liberal intergovernmentalists consider institutions to be of limited importance in the integration process.<sup>99</sup> Moravcsik posits that liberal intergovernmentalism fundamentally takes a two-stage approach. In the first stage, national preferences are primarily determined by constraints and opportunities imposed by economic interdependence, while in the second stage intergovernmental integration negotiations largely depend on the state's bargaining power and desire to control the domestic agenda.<sup>100</sup>

Moravcsik goes on to expound liberal intergovernmentalism as exhibiting three essential elements: the assumption of rational behaviour, a liberal theory of national preference formation

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<sup>95</sup>S Dosenrode, "Federalism Theory and Neo-Functionalism: Elements for Analytical Framework" (2010) 2(3) *Perspectives on Federalism* 23.

<sup>96</sup> *ibid.*

<sup>97</sup>A Moravcsik, "Preferences and Power in the European Community: A liberal Intergovernmental Approach" (1993)31(4) *Journal of Common Market Studies* 473-525. See generally, A Moravcsik, *The Choice for Europe: Social Purpose and State Power, from Messina to Maastricht* (1<sup>st</sup> ed Cornell University Press, Cornell 1998).

<sup>98</sup>A Moravcsik, "Federalism in the European Union: Rhetoric and Reality" in, K Nicolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford University Press Oxford 2001) 161-187, at 181.

<sup>99</sup> *ibid.*

<sup>100</sup>A Moravcsik (1993), (n) 97, 517.

and an analysis of inter-state negotiation.<sup>101</sup> The assumption of rational state behaviour provides a general framework for the analysis, describing the cost and benefits of economic interdependence as the primary determinants of national preferences.<sup>102</sup>

However, intergovernmentalism is not without criticism. Intergovernmentalism has been faulted for understating the role of supranational institutions in integration by emphasising the state-centric approach.<sup>103</sup> The effect of this has been to diminish or minimise the influence and ultimate independence of integration institutions, therefore slowing the deepening of the integration process.<sup>104</sup>

Further criticism is laid on the intergovernmentalists' view of the limited importance of supranational institutions. The liberal intergovernmentalists' view of limited importance of supranational organs has been disproved by the development of strong and effective supranational organs of the EU, which is the context in which the approach bases its fundamental theories. An illustration is found in the jurisdictional and competence tensions between the EU and national organs. For instance, Siegfried Bross, a German Judge, has called for a separate court to preside over disputes which overlap in competencies or jurisdictional questions of the ECJ and national courts of member states. This court would preside particularly over questions of national constitutional law.<sup>105</sup> In fact, in Bross' opinion, the ECJ cannot make decisions on national constitutional law. Similarly, national courts are disempowered because they cannot rule on the interpretation of EU law.<sup>106</sup> Additionally, the principle of subsidiarity offers no relief for the competence or confusion despite the fact that the EU should only act if the goal cannot be

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<sup>101</sup>A Moravcsik (1998), (n) 97, 480.

<sup>102</sup> *ibid*, 480-481.

<sup>103</sup> PG Colletz, *Introducing the European Union; Between Supranationalism and Intergovernmentalism* (2013) [https://eurocultur.eu/2013/11/04/introducing-the-european-union-between-supranationalism-and-intergovernmentalism/ p.1.>](https://eurocultur.eu/2013/11/04/introducing-the-european-union-between-supranationalism-and-intergovernmentalism/p.1.>) accessed on 27<sup>th</sup> June 2018.

<sup>104</sup>*ibid*.

<sup>105</sup>J Weiler and M Kocjan, "The Law of the European Union. Principles of Constitutional law: The Relationship between the Community Legal Order and the National Legal Orders: Competencies" (2004/5) <https://jeanmonnetprogram.org/wp-content/uploads/UNIT6-EU-2004-> accessed on 27<sup>th</sup> June 2018, 56

<sup>106</sup> *ibid*.

successfully achieved by its member states.<sup>107</sup> This, Bross observes, is primarily because of the fact that when the EU member states transfer powers to the supranational level, they implicitly acknowledge that a decision is better made at the EU level and cannot, therefore, invoke the subsidiarity principle at a later stage.<sup>108</sup>

The intergovernmental approach to integration is common place in the African integration process. Most RECs in Africa are intergovernmental units with some exhibiting limited supranational features or organs.<sup>109</sup> Most integration efforts in Africa are spearheaded by states which wield influence over the organs created in the integration efforts. In essence, African integration efforts are intergovernmental and state-centric. Intergovernmentalism, therefore, seems to find favour on the African continent, largely because of its assurance of the state's retention of its sovereign authority with little, if any, of it ceded to the integration organs.

On the other hand, commentators such as Senghor and Forere prefer to view and discuss Africa's integration through the lenses of functionalism and neo functionalism, and for good reason.<sup>110</sup> African states want to protect their sovereignty while fostering international co-operation and incrementally, through the establishment of regional organisations to promote

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<sup>107</sup> *ibid*, 129-171. The principle of subsidiarity has been praised and criticised in equal measure but remains a critical pillar of the European integration process. In the African context, Kaaba and Fagbayibo (2019), argue that the principle of subsidiarity can be a useful tool for the AU in ensuring observance of democratic ideals, the rule of law and respect for human rights. See, O Kaaba and B Fagbayibo, "Promoting the Rule of law through the Principle of Subdiarity in the African Union: A Critical Perspective" (2019) *Global Journal of Comparative Law* 27-51.

<sup>108</sup> *ibid*.

<sup>109</sup> The AEC, AfCFTA, IGAD, EAC, ECOWAS, SADC, COMESA and TFTA are all intergovernmental efforts at integration. The OHADA effort is an attempt at a supranational approach to integration. For a discussion of the attempts at supranationalism in Africa and challenges thereto, see, B Fagbayibo, (n) 32, 32-69.

<sup>110</sup> J C Senghor, "Theoretical foundations for Regional Integration in Africa: An Overview" in, PA Nyong'o (ed.) (1990) 17(18) *Regional Integration in Africa: Unfinished Agenda African Academy of Sciences*; and M Forere (n) 81, 31.



economic development.<sup>111</sup> This, according to Forere, resonates well with the functionalist and neo-functionalist approaches in which common interest is seen as a key motivation for integration.<sup>112</sup>

However, there is also compelling evidence which points to Africa's integration efforts as something which strongly gravitates towards intergovernmentalism. Ibrahim, Ogbeid and Adams<sup>113</sup> advance that the AU is itself an intergovernmental body although, as Fagbayibo observes, the original idea was to create organs with supranational authority under the intergovernmental AU.<sup>114</sup> Senghor and Forere conclude that since the principal decisions made by the AU are taken by member states, these states control the integration process according to their own interest, and that African states are unlikely to surrender their hard earned sovereignty for an uncertain union of African states.<sup>115</sup>

Maluwa cites pan-Africanism as one of the factors which triggered the birth of the AU and its predecessor, the OAU.<sup>116</sup> Ibrahim, Ogbeid and Adams define pan-Africanism as a "[r]acial universal or Afro-continental feeling of solidarity and shared ancestry among Africans".<sup>117</sup> Maluwa envisions the collective ambition of Africans immortalised in the pan-African spirit as a rallying call towards the continent's political and economic integration.<sup>118</sup> W.E.B Dubois is regarded as the founding father of pan-Africanism or the pan-African movement, which, from

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<sup>111</sup> M Forere, (n) 81, 31.

<sup>112</sup> *ibid.* Functionalism and its off-shoot neo-functionalism, are discussed in part 2.2 of this chapter.

<sup>113</sup> Ibrahim and Ogbeid and Adams, 'An Intergovernmentalist Approach to Regional Integration in Africa: The Efficacy of the African Union' (2015) 1(1) *International Journal of Multidisciplinary Research and Modern Education* (IJMRME) 461-479 [461].

<sup>114</sup> B Fagbayibo, "A Supranational African Union? Gazing into the Crystal Ball" (2008) *De Jure* 493-503, at 498.

<sup>115</sup> Ibrahim and Ogbeid and Adams, (n) 113, 461.

<sup>116</sup> T Maluwa, "The Constitutive Act of the African Union and Institution-Building in Post-colonial Africa" (2003) 16 *Leiden Journal of International Law*, 157-170, at 161.

<sup>117</sup> Ibrahim and Ogbeid and Adams, (n) 113, 465.

<sup>118</sup> T Maluwa, (n) 116, 161.

conception, sought to fight against the western domination of Africa, and to restore dignity, self-determination, and unity within Africa and its diaspora.<sup>119</sup>

It has been observed that Africa's integration has always been advanced by strong charismatic leaders who ride on the pan-African philosophy.<sup>120</sup> The formation of the OAU was spearheaded by the then Presidents of Tanzania, Julius Nyerere, Egypt's Gamal Abdel Nasser and Ghana's Kwame Nkrumah.<sup>121</sup> Similarly, the transformation of the OAU into the AU, and reform of the latter's structures, had Presidents Olusegun Obasanjo of Nigeria, Thabo Mbeki of South Africa and Muammar Al-Ghaddafi of Libya as prime movers.<sup>122</sup> The common theme running through both eras of Africa's integration is the strong leaning towards an intergovernmental approach and the ideology of pan-Africanism as a rallying call.

Despite its popularity on the continent, intergovernmentalism has still endured criticism. Ibrahim, Ogbeid and Adams advance that much of the OAU's failure can be attributed to its policy of non-interference in member states' internal affairs.<sup>123</sup> This, they observe, weakened the OAU's ability to prevent and manage conflicts, civil wars and even colonialism.<sup>124</sup> This was partly because

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<sup>119</sup>A Badre, "Supranational Versus Intergovernmental Structure: The European Union vs. the African Union" (2014) 1 *Goethe University Fourth International Studies Conference* 1- 58, 11 <[https://www.researchgate.net/publication/315655664\\_Supranational\\_Integration\\_Versus\\_Intergovernmental\\_Structure\\_The\\_European\\_Union\\_vs\\_the\\_African\\_Union](https://www.researchgate.net/publication/315655664_Supranational_Integration_Versus_Intergovernmental_Structure_The_European_Union_vs_the_African_Union)> accessed on 25<sup>th</sup> September 2018. In the colonial era, most African liberation movement leaders favoured a supranational political Union of the continent. After independence, and having tasted power, most leaders were no longer interested in a political union or supranational OAU but preferred to engage as sovereign states in an intergovernmental approach. Few leaders, like Nkrumah, still advocated for a supranational integration of the continent. For a discourse of the relationship between Nkrumah's approach to African Integration and intergovernmentalism, see generally, B Fagbayibo (2018), "Nkrumahism, Agenda 2063, and the Role of Intergovernmental Institutions in Fast tracking Continental Unity" (2015) 53(4) *Journal of African Studies* 629-642.

<sup>120</sup>A Biney, "The Legacy of Kwame Nkrumah in Retrospect" (2008) 2(3) *Journal of Pan African Studies* 129-159, at 147.

<sup>121</sup>A Badre, (n) 119, 11.

<sup>122</sup> Badre, (n) 119, 147.

<sup>123</sup> Ibrahim and Ogbeid and Adams, (n) 113, 475.

<sup>124</sup> *ibid.*

of the intergovernmental approach adopted which caused the AU's predecessor, the OAU, to shy away from establishing organs with an overarching supranational authority to ensure peace and security on the continent.<sup>125</sup> However, the policy of non-intervention in internal affairs of partner states always stood in the way. Notwithstanding, it appears that the Constitutive Act of the AU has reversed the policy on non-interference in internal affairs of member states. Article 4(h) of the Constitutive Act of the AU provides for "the right of the Union to intervene in respect of grave circumstances such as war crimes, genocide and crimes against humanity."<sup>126</sup>

At the sub-regional level, the intergovernmental approach of "integrating for self-interest" has been exhibited by African states resulting in their forming a multiplicity of RECs, and the undesirable "spaghetti bowl effect" in integration.<sup>127</sup> Other examples of intergovernmental self-interest moves, at sub regional REC levels in Africa, were seen in the 1989 move by Mauritania to pull out of the Economic Community of West African States ECOWAS and become a founding member of the Arab Maghreb Union (AMU).<sup>128</sup> Morocco unilaterally withdrew its membership of the then OAU in 1984 when the continental body took a decision that was perceived to be inimical to its national interest by recognising the disputatious Sahrawi Arab Democratic as an independent state.<sup>129</sup> However, Morocco was re-admitted to the AU in January 2017.

### 2.3.1.2 Functionalism

Functionalism as a theory of integration can be traced back to the inter-war period between the end of First World War and the beginning of Second World War. The theory is credited to David Mitrany, who is regarded as the father of functionalism in international relations. Writing on the brink of the Second World War and following the collapse of the League of Nations, Mitrany's appreciation of international relations was largely influenced by the geopolitics of the inter-war

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<sup>125</sup> *ibid.*

<sup>126</sup> On the supranational perspective of Article 4 (h) of the Constitutive Act of the AU, see B Fagbayibo, "A Supranational Perspective" (2014) in D Kuwali and F Viljoen, *Africa and the Responsibility to Protect* (Routledge London 2016) 129-138.

<sup>127</sup> A term coined by J Bhagwati and A Panagariya (eds), *The Economics of Preferential Trade Agreements* (AE: press Washington DC 1996) 8-27.

<sup>128</sup> Ibrahim and Ogbeid and Adams, (n) 113, 475.

<sup>129</sup> *ibid.*

period whereby the state's power, sovereignty and territorialism over-shadowed cooperation and integration efforts.<sup>130</sup> Mitrany suggests that for a supranational authority to succeed, it should be established based on the functions and needs, which require scientific knowledge, expertise and technology.<sup>131</sup> In essence, Mitrany, and functionalism theorists trust that global integration will only be achieved through specialised institutions.<sup>132</sup>

Neo-functionalism as a theory emerged after the Second World War. With the end of the Second World War came the economic renewal of Europe and a reconstruction of the battered economies of the continent. It is in this environment that the functionalists' theorists locate their perspective on integration. Neo-functionalism is grounded in the work of its earliest proponent, Ernst B Haas.<sup>133</sup> Haas sees integration as being "the ability of states to persuade others to shift their loyalties, expectations and political activities towards a new centre whose institutions possess or demand jurisdiction over the pre-existing national states."<sup>134</sup>

The difference between functionalism and neo-functionalism is on their various approaches to integration, and more specifically, the role played by the state in integration. Neo-functionalists take the bottom-up approach while functionalists take the top-bottom approach.<sup>135</sup> According to Hamad, the bottom-up approach means that economic integration should start from the bottom-line and, through time and trust, member states should proceed towards political integration.<sup>136</sup> He notes that the bottom-up approach places a major emphasis on the role of non-state actors, is people or market driven and also takes care of social interests as dynamic forces of integration.<sup>137</sup>

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<sup>130</sup> D Mitrany, *The Progress of International Government* (New Haven: Westview Press 1933) 101.

<sup>131</sup> *ibid.*

<sup>132</sup> H Hamad, "Neo-Functionalism: Relevancy for East African Community Political Integration?" (2016) 9(7) *Africology: The Journal of Pan African Studies*, 69-81, at 72.

<sup>133</sup> E B Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-57* (Stanford University Press, Stanford 1958) 16.

<sup>134</sup> *ibid.*, 6.

<sup>135</sup> Hamad, (n) 132, 72-73.

<sup>136</sup> *Ibid.*, 72.

<sup>137</sup> *ibid.*

On the other hand, the top-bottom approach advanced by Hass and functionalist theorists is based on the “spill over” theory. Rosamond describes the “spill over” phenomenon as “a situation whereby the cooperation in one field or some policy areas such as currency exchange rates, taxation, and wages necessitates cooperation in another.”<sup>138</sup> Lindberg captures the essence of the spill-over theory most succinctly, as follows:

Spill-over refers to a situation in which a given action related to a specific goal, creates a situation in which the original goal can be assured only by taking further condition and a need for more action, and so forth.<sup>139</sup>

According to the neo-functionalists, there are two kinds of spill-over: functional/economic and political.<sup>140</sup> Functional or economic spill-over is the interconnection of various economic sectors and would create automatic integration in various policy areas.<sup>141</sup> Political spill-over is the creation of supranational governance models which may require political good-will from member states of the integration effort.<sup>142</sup>

Functional integration in areas such as river basins, transportation links and meteorology has been useful on the continent, particularly since most African economies are small, with a substantial number of which are landlocked and cannot thrive or function in isolation.<sup>143</sup> Various forms of functional regionalism have been successful on the continent. For instance, the Southern Africa Power Pool (SAPP)<sup>144</sup>, the Senegal River Basin Multi-Purpose Water Resources

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<sup>138</sup> B Rosamond, *Theories of European Integration* (New York: St. Martin's Press 200) 59.

<sup>139</sup> L Lindberg, *The Political Dynamics of European Integration* (Stanford: Stanford University Press 1963) 10.

<sup>140</sup> EO Ericksen, and JK Fossum, *Democracy in the European Union: Integration through Deliberation?* (London: Routledge 2002) 10.

<sup>141</sup> *ibid.*

<sup>142</sup> *ibid.*

<sup>143</sup> J Ravenhill, “Regional Integration in Africa: Theory and Practice” p. 3 in HD Levine and D Nagar (eds.) *Region-Building in Africa: Political and Economic Challenges* (Palgrave: Macmillan 2016).

<sup>144</sup> On the Southern African Power Pool, see Nagar, D (2012) “Regional Economic Integration” in C Saunders and Gwiayayi AD and Nagar, D (eds) *Region- Building in Southern Africa: Progress, Problems and Prospects* (Zed Books

Development Project<sup>145</sup> and the ECOWAS Centre for Renewable Energy and Energy Efficiency.<sup>146</sup> The World Bank notes that functional integration projects are always visible and of immediate impact.<sup>147</sup>

### 2.3.1.3 Supranationalism

A supranational union or institution is an entity whose authority transcends the sovereignty of the member states and their respective territorial boundaries.<sup>148</sup> Unlike states in a federal union, member states retain ultimate sovereignty, although some sovereignty is exercised by, shared with, or added to the supranational body.<sup>149</sup> Since it is an agreement between sovereign states, it is usually based on treaties or agreements.<sup>150</sup>

Joseph Weiler, a foremost supranationalism theorist, classifies supranationalism into two categories: the juridical/ normative approach and the political/ decisional approach.<sup>151</sup> A more contemporary view, in the context of the EU integration is, according to Weiler, characterised by

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London (2012) 131-147. See also, JG Wright and JV Collier, “Systems Adequacy in the Southern African Power Pool: A case for Capacity Mechanisms” (2018) 29(4) *Journal of Energy in Southern Africa* 37-50.

<sup>145</sup> “Senegal River Basin Multi-Purpose Water Resources Development Project” *World Bank* <[www.projects.worldbank.org/P093826/senegal-river-basin-multi-purpose-water-resources-development-project?lang=en](http://www.projects.worldbank.org/P093826/senegal-river-basin-multi-purpose-water-resources-development-project?lang=en)> accessed on 15<sup>th</sup> November 2018.

<sup>146</sup> The projects run by the ECOWAS Centre for Renewable Energy and Energy Efficiency, established in 2013, are available at <<https://www.ecowas.int/specialized-agencies/ecowas-centre-for-renewable-energy-and-energy-efficiencyecreee/>> accessed on 15<sup>th</sup> November 2018.

<sup>147</sup> “Partnering for Africa’s Regional Integration: Progress Report on Regional Integration Assistance Strategy for Sub-Saharan Africa” *World Bank*, CAS Progress Report 60387, 21<sup>st</sup> March 2011 <<http://documents.worldbank.org/curated/en/420961516900319550/text/122899-WP-PUBLIC.txt>> accessed on 15<sup>th</sup> November 2018. In the report, the World Bank notes that the regional power pools could save African states \$2 billion in energy costs each year.

<sup>148</sup> J Weiler, “The Community System: The Dual Character of Supranationalism” (1981) 1 *Year Book of European Law* 267-280, 267.

<sup>149</sup>K Kimmo, “The European Constitution Making” (2004) *Centre for European Policy Studies* [http://aei.pitt.edu/32581/1/20\\_EU\\_Constitution.pdf](http://aei.pitt.edu/32581/1/20_EU_Constitution.pdf), accessed on 23<sup>rd</sup> September 2019, 21-26, 21.

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

different levels of supranationalisation and integration.<sup>152</sup> The 1958-1968 period is, for instance, distinguished from the current EU supranationalism model. The current period is characterised by the institutional domain, monetary domain and geographical extension of the common market.<sup>153</sup>

Normative supranationalism addresses three main principles: the doctrines of direct effect, supremacy and the pre-emption.<sup>154</sup> The doctrine of direct effect relates to the vesting of authority in main autonomous institutions, such as was done in the early days of European integration through the ECSC, in order to adopt self-executing member state law.<sup>155</sup> The doctrine of supremacy means that there is a hierarchy of norms with the integration organ law being superior to the member state law.<sup>156</sup> The pre-emption principle, on the other hand, means that the integration unit has policy making competence where state members are precluded from enacting legislation contradictory to the integration unit's law and are pre-empted from taking such action at all.<sup>157</sup>

The EU is often cited as the foremost example of supranationalism. This is primarily because its institutions exercise authority over member states and may supplant national organs. The EU parliament passes laws that apply to the entire membership overriding national laws or legislation.<sup>158</sup> The Court of Justice of the European Union (CJEU) and the European Court of

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<sup>152</sup>ibid. See also generally PJG Kapteyn and Verloren and P Van Themaat, (1998) in Lawrence W. Gormley (eds), *Introduction to the Law of European Communities* (3<sup>rd</sup> ed, London: Sweet and Maxwell).

<sup>153</sup> J Weiler Joseph, (n) 148.

<sup>154</sup> R Leal-Arcas, "Theories of Supranationalism in the EU" (2007) 8(1) *Journal of Law in Society* 96.

<sup>155</sup> ibid.

<sup>156</sup> B De Witte, "Direct Effect, Supremacy, and the Nature of Legal Order" (1999) in P Craig and G de Burca (eds) *The Evolution of EU Law* 177.

<sup>157</sup> B Fagbayibo (n) 32, 33.

<sup>158</sup> The CJEU is established under by the Treaty of Lisbon which came into force enforces European Union Law including annulling the decisions, regulations and directives of EU and state member organs and ensuring compliance with EU obligations by states and even individuals. CJEU and the Treaty of Lisbon are available at <[https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en.>](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.>) accessed on 27<sup>th</sup> June 2018. The ECHR was established in 1959 and has jurisdiction to rule on state and individuals' allegations of violations of civil and political rights. Set out in the European Convention on Human Rights. The Courts' decisions are binding on state parties and have led governments to alter their legislation and administrative practices in a wide range of areas. See <<https://echr.coe.int/Pages/home.aspx?p=home.>> accessed on 27<sup>th</sup> June 2018.

Human Rights (ECHR) have original jurisdiction in matters regarding the interpretation of the constituting treaty, treaties entered into by the state parties, trade and investment claims and violations of human rights.<sup>159</sup> The Courts' jurisdiction applies across the entire EU membership.<sup>160</sup> State members cannot extricate themselves from the coercive force of the EU organs. EU treaties, decisions of the EU Commission, Parliament, Courts and other organs must be complied with by member states and their organs.<sup>161</sup>

The principles of direct effect of EU law, supremacy of the CJEU over national courts and the overriding effect of its decisions were first demonstrated in the 1963 case of *Van Gend en Loos v Nederlandse Administratie der Belastingen*<sup>162</sup> in which the court held that provisions of the EC treaty have direct effect in the community bestowing enforceable rights as between individuals and the member states.<sup>163</sup>

In yet another decision, *Commission v Council*,<sup>164</sup> discussed whether the competence to negotiate and conclude an international agreement, in the transport field, vested powers in the member states or in the community. The CJEU ruled that a matter already regulated by the EU institutions could not be dealt with internationally without community participation, precisely because it is regulated by an EU institution.<sup>165</sup>

The cases above demonstrate Weiler's aforementioned doctrines of supranationalism in practice. The *Van Gend en Loos* case underscores the doctrine's direct effect by emphasising the application and availability of the EU parliament's legislation towards individuals working against

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<sup>159</sup> See AS Sweet and B Thomas, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community" (1998) 92(1) *The American Political Science Review* 63-81.

<sup>160</sup> *ibid.*

<sup>161</sup> *ibid.*

<sup>162</sup> [1963] ECR1, 11-12.

<sup>163</sup> R Leal-Arcas, (n) 154.

<sup>164</sup> [1971] ECR, 273.

<sup>165</sup> [P] 17-18 of the judgement.



the EU states.<sup>166</sup> This is achieved by granting aggrieved individuals direct access to the CJEU and the ECHR, specifically on questions regarding the interpretation and enforcement of rights and obligations created by EU and national laws. Moreover, the case highlights how the doctrine is further achieved by the CJUE and the ECHR exercising original jurisdiction in such matters, so as to override national state courts, which would otherwise have jurisdiction.

The *Commission* case also brings to the fore the pre-emption principle by emphasising the overriding effect or supremacy of EU legislation and law over national laws of state members. The effect thereof being that any national laws which contradict EU laws and which regulate certain questions stand voidable. The case, therefore, also underlines the direct effect of EU law over the member states.

Africa has had its own experiences and experiments with supranationalism, both at the regional and sub-regional levels.<sup>167</sup> This has mainly been at the sub-regional level, with both success and failure in equal measure.<sup>168</sup> These will be highlighted in the next chapter of this thesis, particularly within the context of dispute resolution.

## **2.4 International Trade and Investment Dispute Resolution in Africa**

Dispute resolution clauses in international agreements are often referred to as “midnight” clauses and for good reason.<sup>169</sup> As a general rule, after lengthy negotiations on the substance of an agreement, diplomats or their technical persons tend to cut and paste dispute settlement procedures

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<sup>166</sup>The direct effect and supremacy principles have also been defined by de Witte as “the capacity of a norm of Community law to be applied in domestic court proceedings” Bruno de Witte, “Direct Effect, Supremacy, and the Nature of the Legal Order”, in *The Revolution of EU Law* at p.117, (Paul Craig and Grainne de Burca eds.1999).

<sup>167</sup> See generally, B Fagbayibo, (n) 32.

<sup>168</sup> *ibid.*

<sup>169</sup> M Yu, “Arbitration and Mediation in Asia-Pacific Interviews with Mediation and Arbitral Centres and Law Departments Best Practices” (2014) *Associates of Corporate Counsel*  
<[https://www.researchgate.net/publication/323227946\\_Arbitration\\_and\\_Mediation\\_in\\_Asia\\_-\\_Pacific\\_Interviews\\_with\\_Mediation\\_and\\_Arbitral\\_Centers\\_and\\_Law\\_Department\\_Best\\_Practices](https://www.researchgate.net/publication/323227946_Arbitration_and_Mediation_in_Asia_-_Pacific_Interviews_with_Mediation_and_Arbitral_Centers_and_Law_Department_Best_Practices)> accessed on 13<sup>th</sup> December, 2018, 13.

from previous treaties without much thought about what would happen if these procedures actually needed to be used.<sup>170</sup>

Dispute settlement is to international law what pathology is to medicine.<sup>171</sup> It is about the worst case scenario in the event the consensus which made it possible for the treaty or its rules to be created, no longer exists or when allegations of violation are being traded.<sup>172</sup> The purpose for treating dispute resolution clauses in a casual manner lies with the negotiating parties hope that the procedures may never be used.<sup>173</sup> Discussing dispute settlement whilst celebrating the conclusion of difficult and sometimes fragile agreements is tantamount to discussing the possibility of divorce at a wedding reception.

The overarching canonical normative principle on the peaceful settlement of international disputes is found in Article 33 of the UN Charter. The provision underscores the members' commitment to the peaceful settlement of international disputes by means of their own choice. The provision reads that:

The parties to any dispute, the continuance of which is likely to endanger the maintenance to international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful measures of their own choice.

The Charter of the UN, therefore, recognises peaceful settlement of disputes to include both judicial (adjudicative) and “diplomatic” or non-judicial methods. A similar provision is found in the Constitutive Act of the AU and in the AEC Treaty, with particular reference to economic regionalism.<sup>174</sup> The judicial (adjudicative) methods of settlement of disputes include arbitration,

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<sup>170</sup> *ibid.*

<sup>171</sup> CPT Romano, “International Dispute Settlement” *Oxford Handbook of International Environment Law* (Oxford University Press Oxford 2007) 1037–1054, 1037.

<sup>172</sup> *ibid.*

<sup>173</sup> *ibid.*

<sup>174</sup> Article 4(e) of the Constitutive Act of the AU provides as one of its key principles: “peaceful resolution of conflicts among member states of the union through such appropriate means as may be decided upon by the Assembly”. Article

courts and tribunals.<sup>175</sup> Non-judicial or diplomatic methods include; negotiations, enquiry, mediation and conciliation.<sup>176</sup> The most significant difference between adjudicative and diplomatic dispute resolution procedures is that adjudicative methods offer legally binding outcomes, while diplomatic ones rely on the goodwill of the parties to embrace and enforce their outcomes.<sup>177</sup>

The type of disputes anticipated and its actors are the two elements needed to determine the dispute resolution mechanism to be employed. By way of illustration, where disputes are largely between state parties, it is preferred that diplomatic channels are followed to mitigate an agreement before parties resort to taking the case to court. On the other hand, parties to investor-state disputes, which involve foreign third-party non-state actors, prefer to elect a dispute settlement system before which they have direct and unfettered access and standing.

International dispute resolution has a two-pronged procedural approach. It may either be by use of permanent bodies or ad hoc solutions. International judicial bodies or courts are often institutions established by treaty or agreement with permanent existence, while arbitration, mediation and conciliation are ad hoc processes that are activated to deal with disputes, as and when they arise.

#### ***2.4.1 Trade and Investment Dispute Resolution in Africa***

The dispute settlement methods preferred in resolving trade and investment disputes in Africa range from the non- formal to formal systems. For trade disputes, which are usually between states, preference is mostly for non-formal methods such as negotiation, mediation and conciliation.<sup>178</sup>

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3(1) of the AEC Treaty reads: “peaceful settlement of disputes among member states, active cooperation between neighbouring countries and a peaceful environment as a prerequisite for economic development.”

<sup>175</sup> M Yu, (n) 169,1038.

<sup>176</sup> *ibid.*

<sup>177</sup> *ibid.*

<sup>178</sup> The reason for this is that non-formal traditional dispute settlement methods do not prejudice the political relationship of the disputing state parties. See Yu, note 168 above, at p. 1041. See also, AK Schneider, “Democracy in Dispute Resolution: Individual Rights in International Trade Organisations” (1998) 194 *PA.J.INT’L ECON.L*, 627.

Investment disputes, which include non-state entities, usually, incline towards formal rule-based and binding systems such as arbitration, tribunals and courts.<sup>179</sup> A brief outline of these approaches will now follow.

***(a) Non-formal Methods: Negotiation, Mediation and Conciliation***

***(i) Negotiation***

Negotiation is an informal process which involves the parties meeting and identifying their issues of dispute with a view to arriving at a mutually satisfying solution without the help of a third party.<sup>180</sup> Negotiation is acknowledged as the most enduring method of conflict resolution with maximal control of the process by the disputants.<sup>181</sup>

Negotiation is one of the most efficient methods of settlement of disputes. In negotiating, parties can also forge or fashion their own solution to fit their circumstances without the need for strict rule-based approaches.<sup>182</sup> It is for these two reasons that negotiation is preferred by states in resolving their disputes. However, because of its informal nature, negotiation is non-coercive and largely depends on the parties' good will.<sup>183</sup> The proceedings can, therefore, also endlessly stretch. In addition, power imbalances in negotiations can also affect the outcome.<sup>184</sup>

In the international trade arena, negotiation is used in settling disputes informally using diplomacy between states.<sup>185</sup> In international trade relations, negotiation is best exemplified by the dispute settlement system of the General Agreement on Trade and Tariffs ("GATT") as it existed

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<sup>179</sup>AK Schneider, "Getting along; The Evolution of Dispute Resolution Regimes in International Trade Organisations" (1999) 2(4) *Michigan Journal of International Law* 707.

<sup>180</sup>J Pan, *Towards a Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Mauritius Nijhoff Publishers Amsterdam 2009) 53. See also, GM Goh, *Dispute Settlement in Space law: A Multi-Door Courthouse for Outer Space* (Mauritius Nijhoff Publishers Amsterdam 2007) 96.

<sup>181</sup> K Muigua, *Resolving Conflicts through Mediation in Kenya* (Glenwood Publishers Nairobi 2015) at p. 11.

<sup>182</sup> K Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (Glenwood Publishers: Nairobi 2015) 23.

<sup>183</sup> *ibid*, 24.

<sup>184</sup> *ibid*.

<sup>185</sup>AK Schneider, (n)179, 713.

prior to the creation of the WTO, as well as the current form of Chapter 20 of the North America Free Trade Area (NAFTA).<sup>186</sup>

(ii) *Mediation*

Mediation is a voluntary, informal, consensual, strictly confidential and non-binding conflict management process, in which a neutral third party helps parties reach a negotiated settlement.<sup>187</sup> Mediation is largely a process of negotiation with the facilitation of a third party neutral. Mediation has also been referred to as a continuation of the negotiation process by a three-way process as opposed to a two-way process that typifies negotiation.<sup>188</sup>

In essence, the mediator's role is to act as an independent and impartial third party that has no stake in the outcome of the process but is mindful to clarify issues and helps parties explore solutions so that they reach their own peaceful settlement.<sup>189</sup> A mediator must be acceptable by the parties, should the process stand a chance of achieving its goal.<sup>190</sup>

Mediation takes two principal forms: mediation in a political process and mediation in a legal process.<sup>191</sup> The difference between the two forms lies in the distinction between a dispute and a conflict.<sup>192</sup> In the political process, mediation is aimed at resolution, as opposed to the

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<sup>186</sup>NAFTA 1992 I.L.M, 289. The GATT (1994) is available at I.L.M 1125 and <[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47.pdf](https://www.wto.org/english/docs_e/legal_e/gatt47.pdf)> accessed on 13<sup>th</sup> December 2018.

<sup>187</sup>P Fenn, "Introduction to Civil and Commercial Mediation" in the *Chartered Institute of Arbitrators, Workbook on Mediation*, (CI Arb London 2002) 10.

<sup>188</sup> M Mwagiru, *Conflict in Africa: Theory, processes and Institutions of Management* (Centre for Conflict Research, Nairobi 2006) 115-116.

<sup>189</sup> C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Ban Publishers, San Francisco 2006) 14.

<sup>190</sup> M Barkun, "Conflict Resolution through Implicit Mediation" (1964) VII *Journal of Conflict Resolution* 164.

<sup>191</sup> J Burton, *Conflict: Resolution and Prevention* (Macmillan London 1990) 2-12.

<sup>192</sup> *ibid.* Mwagiru (2006) defines conflict as being about needs and values which are non-negotiation, while disputes are about interest and issues which are finite and divisible, thus negotiable. M Mwagiru, (n)187, 42. See also, generally, M Mwagiru, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya* (Institute of Diplomacy and International studies, Nairobi 2008) Chapter Four.

settlements of conflicts.<sup>193</sup> Mediation in legal processes, such as trade disputes, is concerned with settlement of disputes. According to Muigua, the difference between a dispute and a conflict lies in the causes of disagreement.<sup>194</sup> Conflict is concerned with needs and values which are difficult to compromise, while disputes are concerned with interests and issues, on which disputants can compromise.<sup>195</sup> It is, therefore, easier to resolve disputes than it is to resolve conflicts. To resolve conflicts, the underlying issues which result in disagreements have to be addressed.<sup>196</sup> Disputes can, however, be dealt with superficially to the mutual satisfaction of the parties.<sup>197</sup>

Mediation is attractive because of its voluntariness, cost effectiveness, informality, freedom for the creativity in forging solutions, party autonomy and control, non-coerciveness and enduring outcomes.<sup>198</sup> Mediation has been used in Africa since time immemorial. Disputes were resolved through a council of elders who mediated between disputants with an aim of restoring and fostering relations.<sup>199</sup>

The AfCFTA dispute settlement mechanisms, has inbuilt mediation frameworks for the resolution of disputes, between member states, in its Protocol on Rules and Procedures on the Settlement of Disputes.<sup>200</sup> At the sub-regional level, mediation is mostly employed in resolving political disputes and not trade or investment disputes.<sup>201</sup>

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<sup>193</sup>K Muigua, (n) 181, 27.

<sup>194</sup> *ibid*, 5.

<sup>195</sup> M Mwagiru, (n) 187, 42.

<sup>196</sup> M Muigua, (n) 181, 5.

<sup>197</sup> D Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland" (1995) 32 (2) *Journal of Peace Research* 152.

<sup>198</sup>K Muigua, (n) 181, 28.

<sup>199</sup> See K Muigua, (n) 181, 20. See also, generally, J Kenyatta *J Facing Mount Kenya: The Tribal life of the Gikuyu* (Vintage Books, New York 1965) Chapter IX, 128-158.

<sup>200</sup> Article 8.

<sup>201</sup> For example, the ECOWAS intervention in Liberia and Sierra Leone in 1989 and 1991, respectively. ECOWAS has established the Mediation and Security Council and the Council of the Wise as part of its dispute settlement processes. The IGAD has also established a mediation centre in South Sudan with the objective of ensuring effective and timely response to conflicts in the sub-region. See, A Lucy and L Kumalo "Sustaining Peace in Practice" (2018)

114 *Institute of Security Studies (ISS) Policy Brief, 3-4.*

Article 5 of the UN Charter acknowledges the role of regional organisations in conflict resolution and the need for such organisations to set up regional conflict resolution systems. Despite significant efforts by regional and sub-regional organs to this end, the record has not been satisfactory.<sup>202</sup> Article XIX of the OAU Charter formally established the Commission on Mediation, Conciliation and Arbitration. The League of Arab States and IGAD have similarly established mediation and conciliation efforts. These efforts have all struggled to fully constitute and operate.<sup>203</sup>

Three reasons have been identified for the failure of sub-regional integration efforts in Africa in achieving successful mediation interventions in sub-regional conflicts.<sup>204</sup> Firstly, there are the internal divisions amongst member states on whether or not to intervene in domestic political disputes of another member state.<sup>205</sup> In some cases, member states would take sides in the conflict, therefore losing the neutrality required of a mediator.<sup>206</sup> Two cases in point include the reluctance by some ECOWAS member states to intervene in the Liberian civil war in 1989; and the Burundi political crisis of the 1990s and early 2000s.<sup>207</sup> Secondly, there is the lack of formal institutional structures to see through the implementation of the lofty mediation and conciliation

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<[https://cic.nyu.edu/sites/default/files/sustaining\\_peace\\_in\\_practice-liberia\\_and\\_sierra\\_leone.pdf](https://cic.nyu.edu/sites/default/files/sustaining_peace_in_practice-liberia_and_sierra_leone.pdf)> accessed on 23<sup>rd</sup> September 2019. See also, generally, ET Amanor-Lartey, “A Historical Overview of ECOWAS Intervention in Sub-Regional Conflicts: The Case of Sierra Leone” (2015)1 *Somaliland Journal of African Studies* .1-21. On the IGAD mediation in South Sudan, see PA Kasajja “IGAD’s Mediation in the Current South Sudan Conflict: Prospects and Challenges” (2015) 8(2) *African Security* 120-145.

<sup>202</sup> M Pinfari, “Inter-regionalism and Multiparty Mediation: The Case of Arab Africa” (2013) 18(1) *International Journal of Peace Studies* 83-101,88.

<sup>203</sup> *ibid.*

<sup>204</sup> N Okai et.al, *Mediation Conflict in West Africa: An Overview of Regional Experiences* (2014) Available at <[http://cmi.fi/wp-content/uploads/2016/04/WA\\_mediating\\_conflict.pdf](http://cmi.fi/wp-content/uploads/2016/04/WA_mediating_conflict.pdf)> accessed on 13<sup>th</sup> February 2019, 13

<sup>205</sup> *ibid.*

<sup>206</sup> *ibid.*

<sup>207</sup> *ibid.* See also, T Muriithi, “Institutionalising Pan-Africanism: Transforming African Union Values and Principles into Policy” (2007) *Institute for Security Studies Africa Research Papers*, Paper 143, <<https://issafrica.org/research/papers/institutionalising-pan-africanism-transforming-african-union-values-and-principles-into-policy-and-practice> www.issafrica.org>research>papers> accessed on 19<sup>th</sup> September 2019, 4.

blue prints engendered by the sub-regional bodies.<sup>208</sup> As a result, most of these efforts remain romantic ideas without the financial or institutional capacity to translate into meaningful tangible results. Thirdly, there is the lack of enforcement capacity of the regional bodies to ensure the implementation of mediated settlement of conflicts.<sup>209</sup> This leads to breaches of mediated agreements, without any consequences, either from the AU or sub-regional organs.

(iii) *Conciliation*

Conciliation is a process by which a third party known as a conciliator assists parties in restoring their damaged relationship, by clarifying perceptions and pointing out misconceptions, as well as proposing solutions.<sup>210</sup> A conciliation agreement is final and binding on both parties. If either party fails to uphold the agreement, it can be converted into an award and enforced in court.<sup>211</sup>

Conciliation is an extension of the negotiation process. Conciliation also goes hand in hand with reconciliation. While conciliation is concerned with finding peace and harmony, by putting an end to conflict, reconciliation seeks to re-establish relations.<sup>212</sup> Reconciliation is, therefore, a restorative process which is desirable in enabling long lasting peace and ensuring that competing interests are balanced.<sup>213</sup>

(iv) *Critique of the Non-Formal Dispute Resolution Methods*

Due to their non-binding nature, informal dispute settlement mechanisms do not grant supremacy of the settlements reached over domestic laws of state parties. This is unless such decisions also result in change of law or a conclusion of a treaty that is considered international law under respective domestic laws.<sup>214</sup>

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<sup>208</sup> *ibid*, 14

<sup>209</sup> *ibid*, 15.

<sup>210</sup> P Fenn, (n) 187, 14.

<sup>211</sup> *ibid*.

<sup>212</sup> K Muigua, (n) 181,34.

<sup>213</sup> *ibid*.

<sup>214</sup> AK Schneider, (n) 179, 713.



Governments may publicise negotiation agreements as a public relations strategy. However, negotiated agreements or settlements reached in trade disputes do not form precedent before any court or tribunal.<sup>215</sup> As a result, negotiated settlements do not create predictability for individuals or states that may in future face similar disputes. Enforcement of non-formal settlement agreements is also left to the goodwill of the respective states. There is no oversight institution, and settlements may, therefore, collapse. Where non-formal agreements are not converted into treaties or protocols, their enforcement or implementation can be undermined.<sup>216</sup>

Where mediation, conciliation or negotiations are made mandatory, the disputing parties are coerced into the arrangement with little, if any, choice. This makes the outcome less likely to hold or restore relations.<sup>217</sup> The settlement becomes superficial, addressing the issue of the dispute or conflict only, and not the underlying causes of the conflict.<sup>218</sup> Mutual ownership of the process and outcomes guarantees, to a large extent, the observance of the outcome and lasting or restoration of the relations.

#### ***b) Formal Dispute Settlement Mechanisms***

International commercial arbitration and international Courts are, with respect to settlement of trade and investment disputes, the main features of formal dispute resolution on their international plane. As observed above, the critical difference between formal and the non-formal dispute settlement systems discussed above, is the binding effect of the outcome of the formal systems and the non-binding effect of the non-formal system.<sup>219</sup>

The prominence of international courts and arbitral tribunals has been on the rise. Decisions of international courts and tribunals have become the fourth source of international law.<sup>220</sup>

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<sup>215</sup>ibid, 714.

<sup>216</sup> AK Schneider, (n) 178, 617.

<sup>217</sup> K Muigua, (n) 181, 27.

<sup>218</sup> K Cloke, "The Culture of Mediation: Settlement vs Resolution" (2005) *The Conflict Resolution Information Sources*, Version IV.

<sup>219</sup>A K Schneider, (n) 178, 638.

<sup>220</sup> Chapter II of Article 38 of the Statute of the International Court of Justice.

International treaties and international customary law are the traditional primary sources of international law.<sup>221</sup> Increasingly, the decisions of international courts such as the CJEU, and other adjudicatory bodies such as the WTO and the ICSID arbitral tribunals, are becoming prominent in shaping the course of international law.<sup>222</sup> While the pattern of judicial law-making grows in its effect, Schneider observes that international consensus on the force of this fourth source of international law is still lacking.<sup>223</sup>

A brief discussion on the two principal formal dispute settlement systems will now follow.

(i) *International Commercial and Investment Arbitration*

Arbitration is a process, subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing.<sup>224</sup> This third party, known as an arbitrator, acts as a neutral impartial dispute resolver and applies the law to the facts or evidence so as to reach a binding and final determination.

Arbitration is most popularly used in resolving investor-state or private party disputes. The investor-state arbitration regime arose out of the need to give both rights and remedies to private actors in the international commercial, trade and investment arena.<sup>225</sup> The move to institutionalise investment arbitration began with the creation of the International Centre of the Settlement of Investment Disputes (ICSID) under the aegis of the World Bank.<sup>226</sup> Ten years later, the UN Commission on International Trade Law (UNCITRAL) drafted rules for non-institutional (ad hoc)

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<sup>221</sup>ibid, the third source of international law is "the general principles of law recognised by civilised nations".

<sup>222</sup> MW Janis, *An Introduction to International law* (Aspen Publishers New York 1993) 41.

<sup>223</sup>AK Schneider, (n) 179, 702.

<sup>224</sup> ibid, 714.

<sup>225</sup>TL Brewer, (1995) "International Investment Dispute Settlement Procedures: The Regime of Foreign Direct Investment" (1995) 26 *Journal of Law & Policy and International Business* 655-656.

<sup>226</sup>The ICSID Convention opened for signature 18<sup>th</sup> March 1965 and currently has 154 contracting members who have deposited instruments of ratification. Some African states including South Africa, Djibouti, Cape Verde, Equatorial Guinea, Eritrea, Angola and Libya are not signatories to the ICSID Convention. <<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>> accessed on 12<sup>th</sup> December, 2018

arbitrations.<sup>227</sup> The objective of international arbitration was to provide a forum in which non-state entities would have their disputes resolved by an impartial third party neutral, away from the influence of the state's authority or sovereignty.<sup>228</sup> It was a way to avoid national/domestic courts which in most developing states, were deemed to lack independence and were largely under the influence of the executive arm of the government.<sup>229</sup> The expectation was that an international arbitration system would, therefore, spur economic development by encouraging foreign direct investment. The independence of international arbitral tribunals coupled with the impartiality of the process assures international foreign investors of their ability to access remedies, in the event of breaches and consequential losses.<sup>230</sup>

International arbitration has become a popular method for resolving commercial disputes between private commercial disputants because of its perceived neutrality, fairness and expeditious disposal of disputes. This regime appeals to investors who are often concerned with the potential bias, inefficiency, or unfamiliarity of foreign courts.<sup>231</sup> To this end, for example, ICSID has jurisdiction over any legal disputes arising out of an investment between a contracting state and a national of any other contracting state.<sup>232</sup>

Many bilateral and multilateral investment agreements provide for arbitration as the means of dispute settlement. Some make reference to the ICSID procedure while others refer to other arbitration centres around the world specifically established by international courts or ad hoc

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<sup>227</sup>UNCITRAL Arbitration Rules, UN. Doc.A/3118 (1976). The rules <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>.> accessed on 12<sup>th</sup> December 2015. See, generally, I Dore, I "The UNCITRAL Framework for Arbitration in Contemporary Perspective" (1994) 92(6) *Michigan Law Review* 1989-1995.

<sup>228</sup> See the preamble to the ICSID Convention, (n) 226.

<sup>229</sup> IC Vandevelde, "Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaties" (1998) 36 *Columbia Journal of Transnational Law* 501.

<sup>230</sup> *ibid*, 510.

<sup>231</sup>AK Schneider, (n) 179, 717.

<sup>232</sup> Article 25 of the ICSID Convention. See, generally, DA Solely, "ICISID Implementation: An effective Alternative to International Conflict" (1985) 19 *Int'l L.* 521.

arbitral panels.<sup>233</sup> For example, the COMESA, EAC, OHADA and AfCFTA treaties and agreement all provide for international arbitration as a method of settling disputes under the respective RIAs.<sup>234</sup> The treaties either establish arbitration centres or cloth their judicial /adjudicative organs with special arbitration jurisdiction.

(ii) *Critique of International Commercial and Investment Arbitration*

International arbitration has been criticised on at least three fronts. Firstly, is with regard to the scope of the institutional investment arbitration under the ICSID. While the regime provides for rights against the host government, it does not provide direct effect of rights against another individual.<sup>235</sup> In essence, a private actor has no recourse against another private actor under this regime.<sup>236</sup> It appears that international investment arbitration is solely a right and remedy between a private investor and the host state.<sup>237</sup> Nationals of a state cannot access this forum against their own state. This can be contrasted with other remedies such as the CJEU which gives direct access even to nationals of a state member against the state.<sup>238</sup>

Secondly, most investment agreements or REC treaties provide private entities with such rights as national treatment<sup>239</sup> or a minimum standard of treatment in the host state.<sup>240</sup> However,

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<sup>233</sup>Such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce Court of Arbitration, the Singapore Centre for International Arbitration (SCIA) etc.

<sup>234</sup> Article 29 of the COMESA Treaty, Article 32 of the EAC Treaty, Articles 21-26 of the OHADA Treaty Article 27 of the Protocol to the AfCFTA Agreement, on the Rules and Procedures on Settlement of Disputes.

<sup>235</sup>AK Schneider, (n) 179, 716.

<sup>236</sup> IC Vandevelde, (n) 229, 510.

<sup>237</sup>AK Schneider, (n)179, 717.

<sup>238</sup> National treatment refers to rights granted to individuals, by treaty, to receive the same treatment as the state's nationals. The principle is also known as non-discrimination of foreign investors or the Equality of Treatment doctrine. See JR Zedalis, "Claims by Individual's in International Economic Law: NAFTA Developments" (1996) 7 *AM Rev. INT'L* 115.

<sup>239</sup>According to the minimum standard treatment principle, a state must grant an alien at least a minimum standard of treatment even if it means an alien would receive better treatment than the state's own nationals. For example, Article 18 of the AfCFTA, Article 30 and 37 of the AEC Treaty provide for the minimum standard and national treatment principles.

<sup>240</sup>AK Schneider, (n) 179, 716.

individuals were historically seen as nationals of the states and, on the international plane, could only be represented by their government.<sup>241</sup> Additionally, suits against a government in domestic courts were also foreclosed due to the laws that limited the grounds upon which states could be sued.<sup>242</sup> This meant that foreign investors had little recourse to the host state's domestic legal system.<sup>243</sup> Therefore, foreign investors could not bring actions against a foreign state in their home countries since most states have laws that provided for foreign sovereign immunity. The rise of investment arbitration was, therefore, timely in filling a very compelling gap for the benefit of foreign investors.

Thirdly, arbitral awards generally provide for damages and declarations which may or may not affect domestic law. The process is, therefore, not normatively superior to domestic legal processes. In any event, arbitral awards rely on domestic courts for enforcement. In terms of transparency, arbitral awards are generally confidential and do not provide precedent.<sup>244</sup> For example, the ICSID arbitration mechanism explicitly prohibits the publishing of awards without the consent of the parties.<sup>245</sup> This hampers the predictability of the process for purposes of deterring future conduct and consistently applying legal principles. It is for this reason that some commentators have argued that decisions of international courts such as the ICJ are more credible than those of arbitral tribunals.<sup>246</sup>

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<sup>241</sup>See LL Jaffe, (1963) "Suites Against Government and officers: Sovereign Immunity" (1963) 77 *Harvard Law Review* 1.

<sup>242</sup>*ibid.*

<sup>243</sup>JA Freeburg, "The Role of International Council for Commercial Arbitration in providing Source Material in International Arbitration" (1995) 23 *International Journal of Legal Information* 279.

<sup>244</sup>See, for example, Article 48(5) of the ICSID Convention, (n) 226.

<sup>245</sup> Article 48(5) of the ICSID Convention expressly prohibits the publishing of awards without the consent of the parties.

<sup>246</sup> See, for example, R Attenasio, "Rapporteurs Overview and Conclusions: Of Sovereignty, Globalisation and Courts" (1995-1996) 28 *New York University Journal of International Law and Policy* 1. Article III of the New York convention <<http://www.newyorkconvention.org/new+york+convention+texts>> accessed on 13<sup>th</sup> December 2018.

The enforcement process provided in investment arbitration seems relatively effective but suffers the same general problems of observance and enforcement of international law. The Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) provides that all signatory states enforce arbitral awards in their domestic courts.<sup>247</sup> Therefore, if a state declines to voluntarily honour the arbitral awards, the investor can move for enforcement in the domestic court, in the offending state, or in any state where the offending state has commercial assets.<sup>248</sup> The New York Convention offers a straight forward enforcement mechanism. However, this recourse is only available to member states to the New York Convention.<sup>249</sup> While most developed states have signed the New York Convention, a significant number of developing states, some in Africa, have not.<sup>250</sup>

### (iii) *International Courts and Tribunals*

The International Court of Justice (ICJ) is perhaps the most recognisable international court. The ICJ evolved from its predecessors, the Permanent Court of International Justice (PCIJ)<sup>251</sup> and the Permanent Court of Arbitration (PCA).<sup>252</sup> However, there are other courts and tribunals spread across the globe, mostly in RECs and other integration efforts. On the African Continent, the

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<sup>247</sup>For a detailed discussion on the process of enforcement under the New York Convention, see, generally, R Martinez, “Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1995: The Refusal Provisions” (1990) 24 *INT’LAW* 487.

<sup>248</sup> Any non-commercial assets would not be available for attachment pursuant to domestic foreign sovereign immunities legislation.

<sup>249</sup> 159 countries have signed the New York Convention <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table-0.pdf>> accessed on 13<sup>th</sup> December 2018.

<sup>250</sup> Only 36 of the 54 African countries are signatories to the New York Convention. For a status of the ratification of the Convention, <<http://www.newyorkconvention.org/list-of-contracting-states>> accessed on 13<sup>th</sup> December 2018.

<sup>251</sup> The PCIJ was established in 1921 by the League of Nations. The Court, as the first global court, heard thirty-one cases and issued thirty-seven advisory opinions to international organisations. At the end of World War II, the establishment of the UN sparked the need for a new world court in consideration of parties who were not signatories to the League of Nations. The ICJ was therefore formed in 1945. See MW Janis, (n) 222 118-121.

<sup>252</sup> On July 29, 1899, the Permanent Court of Arbitration (PCA) was established at the first Hague Peace Conference. The Convention for the Pacific Settlement of International Disputes detailed the PCA, which was to become the first dispute settlement mechanism between sovereign states. See, BE Shifman, “The Revitalisation of the Permanent Court of Arbitration” (1995) 23 *International Journal of legal Information* 284.

ACJ&HR, ECOWAS Court of Justice, EACJ, SADC Tribunal and the OHADA CCJA are some of the prominent regional and international courts.<sup>253</sup> There are also other adjudicative bodies whose mandate is similar to regional and international courts. The WTO Disputes Understanding (WTO-DSU),<sup>254</sup> and the yet to be established AfCFTA Dispute Settlement Body (AfCFTA-DSB) are also adjudicative bodies with international jurisdiction.<sup>255</sup>

International courts and tribunals are supranational organs although they are set up under intergovernmental organisations. Some international courts such as the COMESA Court of Justice, the EACJ, the ECOWAS Court of Justice and OHADA CCJ grant rights to private actors under their constitutive treaties to bring complaints to the supranational courts.<sup>256</sup> Others, such as the ICJ, AfCFTA DSB and WTO DSU can only be accessed by the state members.<sup>257</sup> The ACJ&HR and ECOWAS Court of Justice take a hybrid approach where limited access by individuals, mostly on questions relating to breaches of human rights, can be brought directly to the Court by individuals.<sup>258</sup>

Under traditional adjudicative dispute resolution practice, private entities and individuals are neither granted rights directly by the treaty establishing the forum nor have they any right to

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<sup>253</sup> A detailed discussion of the structure, institutional framework and jurisdictional remit of these courts is discussed in chapter 3 of this thesis.

<sup>254</sup> The WTO was established as the GATT in 1994 following the round of multinational Trade Negotiations. The full texts of the WTO Agreements 1994 <[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47.pdf](https://www.wto.org/english/docs_e/legal_e/gatt47.pdf)> accessed on 23<sup>rd</sup> September 2019.

<sup>255</sup> The AfCFTA DSB is established under Article 5 of the Protocol to the AfCFTA on Rules and Procedures on the Settlement of Disputes <<https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>> accessed on 12<sup>th</sup> December 2018.

<sup>256</sup> Article 26 of the COMESA Treaty, Article 30 of the EAC Treaty, Article 9 of the 1991 ECOWAS Court Protocol, and Article 29 of the OHADA Treaty. The direct access by individuals, and what it portends as an aspect of jurisdiction of regional courts is discussed in much more detail in chapter 3.4 of this thesis

<sup>257</sup> See for example, Article 5 of the Protocol to the AfCFTA on Rules and Procedures on Settlement of Disputes. See chapter 3 for a detailed discussion.

<sup>258</sup> See, for example, Article 28 of the ACJ&HR Amendment Protocol and Article 9 of the ECOWAS Court of Justice Protocol. See chapter 3 for a detailed discussion.

bring cases before the forum.<sup>259</sup> Historically, therefore, individuals could only request their governments to render on their behalf claims before the ICJ or other international courts. The regime existed to resolve disputes between states, and therefore, individuals had no recourse to those courts. In some progressive states, private parties have the ability to petition their government to take action on their behalf.<sup>260</sup> In the United States (US), for instance, the US Trade Representative makes the final decision on whether or not to bring a case on behalf of an individual US Citizen and there is no judicial review of his decision.<sup>261</sup>

Schneider argues that individuals' involvement enriches the international dispute resolution system.<sup>262</sup> Individuals play the important function of private enforcement agents of international rights and obligations without relying on states, including their own, or oversight bodies.<sup>263</sup> This is particularly crucial where state actors or oversight bodies are conflicted or reluctant to do so, for political or other considerations.<sup>264</sup>

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<sup>259</sup>See, DM Reilly and S Ordonez, "Effects of the Jurisprudence of the International Court of Justice on National Courts" (1995-96) 28 *New York University of International Law or Policy* 435. The Article analyses the *US Citizens living in Nicaragua v Reagan* and the denial of individuals to bring a case before the, ICJ.

<sup>260</sup> This is done, in the context of the WTO, 1994, under Sections 301 and 302 of the US code No. 2411 (1994). A party can petition the US Trade Representative to investigate a foreign State's policies or practices and bring a case on the individual's behalf before the WTO DSU. For a further discussion on the legal merit of this procedure, see Puckett, and Reynolds, "Rules, Sanctions and Enforcement under Section 301: At odds with the WTO?" (1996) 90 *American Journal of International Law* 675; and JR Silverman, "Multilateral Resolution over unilateral Realisation: Adjudicating the use of Section 301 before the WTO" (1996) 17 *U. PA. J. INT'L ECOW.L.* 233.

<sup>261</sup>See E Eichmann, and GN Horlick, "Political Questions in International Trade/Judicial Review of Section 301?" (1996) *Michigan Journal of International Law* 735. Eichmann (1996) makes the case that refusal by the US Trade Representative to pursue investigations or to pursue an individual's case should be review by the Judiciary.

<sup>262</sup>AK Schneider, (n) 179, 724

<sup>263</sup>P Craig, "Once upon a Time in the West: Direct Effect and the Federalisation of EEC law" (2001) 120 *Oxford Journal of Legal Studies* 453. Craig argues that private enforcement agents are critical to the success of the EU system of direct effect.

<sup>264</sup>D Shelton, "The Participation of the Non-Governmental Organisations in International Judicial Proceedings" (1994) 88 *AM. INT'L.L.* 644. D Shelton advances an argument in support of NGO's being accorded amici curiae status before international Courts. See also, generally, CA Ball, "The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy and Individual Rights under the European Communities Legal Order" (1996) 37 *Harvard International Law Journal* 307.



One other advantage of international courts lies in its transparent process. Unlike arbitration, international courts and tribunals are open and publish their decisions which form precedent in similar disputes.<sup>265</sup> This helps to forewarn states and their legal advisors on the likely outcome of their conduct, making the dispute settlement system predicable.<sup>266</sup> It also makes application of legal norms consistent.

(v) *Criticism of Formal Adjudicative Processes (International Courts and Tribunals)*

There are two enduring areas of criticism levelled against international Courts and tribunals. These are about supremacy of their decisions over national courts and their enforcement.

Depending on whether a state subscribes to monism or dualism, international Courts and their decisions either form part of the law of the state or have to be incorporated through statutory mechanisms. In a monist system, the decision would automatically become part of the domestic legal fabric. Under a dualist system, the international law must be incorporated into domestic law following procedures in domestic law.<sup>267</sup>

In systems which are monist in nature, decisions of international courts override domestic law.<sup>268</sup> Decisions of national courts can, therefore, be struck down for being incompatible with international law.<sup>269</sup>

Compliance with and enforcement of decisions of international tribunals are fairly controversial areas of international law. International courts do not possess control of coercive instruments of power such as armies or police, therefore, many critics of the international system

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<sup>265</sup>AK Schneider, (n) 179, 726.

<sup>266</sup> *ibid.*

<sup>267</sup> The two concepts of monism and dualism in international law have been discussed in part 2 of this chapter. See also Janis, (n) 222, 83-84.

<sup>268</sup> Schneider, (n) 179 726.

<sup>269</sup> W Mattli and A Slaughter, "Revisiting the European Court of Justice" (1998) 52 *INT'L ORG* at p. 177.

points to the ineffectiveness of international law.<sup>270</sup> Enforcement of international obligations, including decisions of international courts and tribunals, rely, first and foremost, on the voluntary compliance by the parties.<sup>271</sup> This is underscored in the doctrine of *pacta sunt servanda*.<sup>272</sup> Moreover, several enforcement mechanisms are also available. Firstly, an offending state may face enforcement proceedings under an escalated process within the enabling treaty.<sup>273</sup> Secondly, the state can be ordered to pay damages.<sup>274</sup> Thirdly, the state may face sanctions including suspension from the organisation's activities, costs, withdrawal of reciprocal rights; and, if necessary, trade embargos.<sup>275</sup> However, underlying these options is the politico-legal question of whether sister member states are willing to invoke these options. The African experience, for example, has shown reluctance, on the part of states, to effect sanctions against other states who offend trade agreements.<sup>276</sup>

Dispute Resolution is a continuum with the non-formal to formal dispute settlement methods on one end of the spectrum and formal systems on the other. With the formalisation of

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<sup>270</sup> Schneider, (n) 179, 721.

<sup>271</sup> *ibid*, 722.

<sup>272</sup> *Pacta Sunt Servanda* is a doctrine of international law that underlies the entire system of treaty-based relations between sovereign states. It is a Latin phrase translated to mean: "Treaties shall be complied with" in good faith. Article 26 of the *Vienna Convention on the Law of Treaties* reads: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith"

<[http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).> accessed on 13<sup>th</sup> December 2018.

<sup>273</sup> AK Schneider, (n) 179, 722.

<sup>274</sup> *ibid*.

<sup>275</sup> See for example Articles 25 and 26 of the AfCFTA Protocol on Rules and Procedures in the Settlement of Disputes which makes provision for these enforcement mechanisms against states that do not obey decisions of the disputes settlement panels.

<sup>276</sup> G Erasmus, note G Erasmus, "The Dispute Settlement Mechanism under the African Continental Free Trade Area" (2018) available at <<https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html>.> accessed on 4<sup>th</sup> October 2018, 3. See also G Erasmus, "The Tripartite FTA: Requirements for Effective Dispute Resolution" in Hertzberg and others (2011) *Cape to Cairo: Making the Tripartite Free Trade Area Work* <<https://www.tralac.org/publications/article/4660-cape-to-cairo-making-the-tripartite-free-trade-area-work.html>.> accessed on 4<sup>th</sup> October 2018, 86.

dispute resolution, the parties control or autonomy is reduced and is ultimately lost when the processes become formal. The cost and time spent significantly increase as the process evolves into formal systems. As processes become formal and adjudicatory, rigid rules come into play and the third-party neutrals intervention becomes stronger as courts and tribunals impose their decisions on parties. There are also stronger requirements for transparency and consistency as decisions are rendered by courts and tribunals.

**c) *Why the Preference for Formal International Adjudicative Processes?***

Preference of formal adjudicative over non-formal processes are essentially an exercise in the examination of the dispute resolution continuum described in the preceding part of this chapter. It is also an attempt at isolating the elements of a progressive, efficient and efficacious dispute settlement process forum from those identified above.

The four main reasons for choice of adjudicative dispute settlement processes over other formal and informal dispute settlement processes are now considered.

*(i) Self-executing or Direct Effect of its Decisions*

Formal settlement of trade and investment disputes that offer “self-executing” or direct effect of rights to parties, particularly private entities and individuals, are attractive to foreign investors and states that are interested in attracting foreign direct investments.<sup>277</sup> Modern day trade treaties have been designed to influence private actors to invest, to import, and to export. To encourage investment, governmental restraint from inequitable treatment has to be guaranteed by the agreement.<sup>278</sup> Private actors who wish to invest in a state make this critical decision based on the

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<sup>277</sup>See, M Schaefer, “Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with respect to Federal Government?” (1996-97) 17 *NW.J.INT’L. L & BUS* 609. See also P Pescatore, “The Doctrine of ‘Direct effect’: An Infant Disease of Community Law” 8 *EUR.L. REV* 155. RA Brand, “Direct Effects of International Economic Law in the United States and the European Union” (1996-97) 17 *NW.J.INT’L L & BUS* 556.

<sup>278</sup>AK Schneider, (n) 179, 707.

rights provided in the treaties, be it bilateral, plurilateral or multilateral.<sup>279</sup> Such parties are, therefore, able to protect their rights, both at the international court level and also before domestic or national courts.

(ii) *Domestic Status of International Tribunals' Decisions*

A dispute resolution system that empowers the domestic judiciary to enforce international decisions is more attractive than one in which there exist doubts as to whether there is supremacy over domestic law.<sup>280</sup>

An international dispute settlement system which directly provides for international law as being part of or supreme to domestic law, or which provides a means by which the decisions of the international courts will be enforced, is most preferred.<sup>281</sup> A system of laws such as the OHADA Uniform Acts, which apply directly in member states without the need for domestication, or any domestic intervention, and which provides a dispute settlement forum (the OHADA CCJA), is assuring to investors.<sup>282</sup>

(iii) *Transparency of Processes of International Tribunals*

The transparency of a dispute resolution mechanism affects how it is perceived and used. The level of transparency of a dispute resolution regime takes three forms: publicity, precedent and predictability.<sup>283</sup> Publicity describes the level of public knowledge about the dispute resolution regime.<sup>284</sup> For example, when the outcome is published, the process is clear, the decision explained and the parties are, therefore, more likely to comply with that decision. While the doctrine of stares

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<sup>279</sup> See, T Cottier and S Nadakavukaren, "The Relationship between World Trade Organisation Law National and Regional Law" (1998) *J. INTL ECON.L* 83.

<sup>280</sup> See, for example, G Albarracin and others, "The Relationship Between the Laws Received from the Organs of MERCOSUR and the Legal System of Countries that comprise MERCOSUR" (1998) 4 *J INT'L & COM. L.* 898.

<sup>281</sup> See the discussion in Chapter 3 of this thesis with respect to supremacy of regional courts over national courts on trade and investment disputes.

<sup>282</sup> See the discussion in Chapter 3 of this thesis on the OHADA Uniform Acts and OHADA CCJA.

<sup>283</sup> AK Schneider, (n) 179 above, at p.709.

<sup>284</sup> A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Agreements* (Harvard University Press Cambridge 1995) 22.

decisis is not used by international tribunals, the tribunals often cite previous decisions as persuasive.<sup>285</sup> Predictability of a dispute resolution system is also very important to its users because it creates confidence in the system.<sup>286</sup> Transparent rules and clear decisions are more likely than not to encourage states and/or private actors to become involved in a disputes resolution regime and increases the legitimacy of the regime.<sup>287</sup>

Transparency, overall, measures the legitimacy of the dispute resolution regime.<sup>288</sup> Formal international tribunals are seen as providing transparent and predictable thorough rule-based systems that end with clear and determinate decisions.

(iv) *Observance and Enforcement of International Tribunals' Decisions*

The lack of a global enforcement mechanism, for decisions of international courts and tribunals, is a long-standing critique of the international legal system.<sup>289</sup> A system of enforcement is nonetheless a critical element in the proper functioning of the international legal system. It is also important for promoting trade.<sup>290</sup> International courts and arbitral tribunals offer processes through which enforcement of their decisions can be effected, unlike the non-binding informal processes. For example, through recognition and enforcement, in domestic courts under the New York Convention, parties have options for enforcing decisions of international arbitral tribunal. The ECOWAS Court of Justice, for instance, has a monitoring and enforcement process which is unique. The ECOWAS Court of Justice Protocol has established a unit in its member states

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<sup>285</sup>R Bhala, "The Myth about stare Decisis and International Trade Law (Part one of a Trilogy)" (1999) 14 *AM.U.INT'L. L. Rev* 845.

<sup>286</sup>L Monroe, "Judicial Decisions" (1987) *AM.K. INT'L* 206.

<sup>287</sup>P Goldman, "The Democratisation of the Development of United States Trade Policy" (2004) 27 *Cornell International Law Journal* 631. See also, RF Housman, "Democratising International Trade Decision Making" (1994) *Cornell International Law Journal* 699.

<sup>288</sup>PB Stephan, "Accountability and International Law-Making: Rules, Rents and Legitimacy (1996-97) 17 *NW.J. WT. L. & Bus.* 681.

<sup>289</sup> See AK Schneider, (n) 178.

<sup>290</sup> PR Milgram, "The Role of Institutions in the Revival of Trade: The Law Merchant. Private Judges and the Champagne Fairs" (1990) 2 *ECON. & POL* 1.

specifically to monitor the implementation of its decisions.<sup>291</sup> Decisions of the OHADA CCJA are enforced by member states in the same manner as domestic courts' decisions.<sup>292</sup>

***d) Political and Economic factors that affect the Choice of an International Dispute Settlement System***

Sovereignty is defined by Lassa as “supreme authority or an authority which is independent of any other earthly authority.”<sup>293</sup> It is also defined as “the supreme absolute uncontrollable power by which any independent state is governed.”<sup>294</sup> International law in relation to sovereignty is described by Allot as “the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory owners in relation to each other.”<sup>295</sup>

Hence, sovereignty, as a political science concept, does not have a universally accepted definition. However, there are at least two elements which are common to most attempts at a definition of the concept. The first is absoluteness. According to Nunez, the degree of absoluteness of authority is critical in the exercise of sovereignty.<sup>296</sup> This absoluteness can, however be limited by a constitution, statute, custom or international law.<sup>297</sup> Secondly, sovereignty denotes the monopoly in exercise of state power or authority. According to Kenneth, it is a community's monopoly on the legitimate use of force.<sup>298</sup> It is, therefore, the right to exclusively exercise this force.

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<sup>291</sup>Article 9 of the ECOWAS Court of Justice Protocol. Viljoen. F. *International Human Rights Law in Africa*, Oxford University Press, 2007, 505.

<sup>292</sup> Article 29 of the OHADA Treaty. This is done through the direct effect of the OHADA Uniform Act on business.

<sup>293</sup> O Lassa, *International Law: A Treatise* 101 (1<sup>st</sup> ed Longmans, Green Publishers London 1905) 1. See also, a similar definition and an outline of the historical development of the concept of Sovereignty by LW Goodman, “Democracy, Sovereignty and Intervention” (1992) 9 *AM. INT'L.L & POLICY*, 27-29.

<sup>294</sup>JR Nolan and others, *Black's law Dictionary* (6<sup>th</sup> ed. West Publishing Kalong 1991) 971.

<sup>295</sup>P Allot, *Eunomia. New Order for a New World* (Oxford University Press Oxford 1990) 324.

<sup>296</sup>JE Nunez, J E (2014) “About the Impossibility of Absolute State Sovereignty: The Middle Ages” (2014) 28(2) *International Journal of Semiotics of law* 645-664, 645.

<sup>297</sup>*ibid.*

<sup>298</sup> N Kenneth, *Foundations of Comparative Politics: Democracies of the Modern World* (Cambridge University Press Cambridge 2005) 22.

Sovereignty is exercised, either de jure or de facto. De jure, or legal, sovereignty is concern with the constitutionally recognised right or to exercise control over a territory.<sup>299</sup> De facto, or actual, sovereignty is concern with whether control, in fact exists.<sup>300</sup>

Sovereignty is important to dispute resolution in so far as it demarcates the precincts within which jurisdiction or judicial authority can be exercised. As already observed, in earlier parts of this chapter, when a state joins an integration organisation, there is, by effect, some relinquishment of sovereign power to the organisation. Some restrictions are placed, for example on the tariffs the state can charge or not charge; a dispute settlement process may also be prescribed which divests jurisdiction from the state's domestic courts; or a monitoring or coordinating organisation may be created.

Therefore, the question is: to what extent is a state joining an international organisation willing to limit its sovereignty? Alternatively, what type of international structure of administration are member states willing to create in order to assuage their concerns over sovereignty?

According to Schneider, the sovereignty given up in formal dispute resolution methods such as international arbitration is minimal.<sup>301</sup> The state retains sovereign authority over other aspects of the state which it still wields control over.<sup>302</sup> However, states engaging on the international plane have legitimate concerns over the exercise of the shared or lost sovereign authority, their national interest versus global interests.<sup>303</sup>

Among all dispute resolution methods available in the international legal system, the supranational court regime asks of members the greatest relinquishment of sovereignty. This is done in three principal ways. Firstly, member states give up their judicial or adjudicatory

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<sup>299</sup> *ibid* 23-24.

<sup>300</sup> *ibid*.

<sup>301</sup> AK Schneider, (n) 179, 756.

<sup>302</sup> *ibid*.

<sup>303</sup> J Atkin, "Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade" (1998) 19 *U.P.A. J.INT'L ECON. L* 229.

sovereignty to a supranational court, with supremacy over domestic courts.<sup>304</sup> Secondly, member states give up sovereignty from the executive branch, which previously controlled trade policy, to the judiciary, both domestic and international.<sup>305</sup> Thirdly, member states relinquish their centralised power to its citizens by granting private actors access to international dispute resolution fora and remedies under international law.<sup>306</sup> States, therefore, consider these forfeitures of sovereignty against the proposed dispute settlement systems. This, they do through the following five lenses.

(i) *Functions of the Organisation*

The objectives of the integration effort also inform the dispute settlement regime to be adopted. Abbott and Snidal argue that an analysis of international regimes of dispute resolution can only be complete if there is an appreciation of the reason why states cooperate or integrate.<sup>307</sup> The functions of international organisations have been categorised into two groups: facilitating, and producing organisations.<sup>308</sup>

Facilitating organisations promote inter-state cooperation through four functions: the normative function, the consultative function, the supportive function and the initiative function.<sup>309</sup> The normative function sets forth principles, norms or rules of the organisation and does not require any structure.<sup>310</sup> The consultative function requires very little structure. This involves integration through meetings, conference, and similar gatherings.<sup>311</sup> The supportive function requires a formal support system since it involves research, information sharing, tracking and policy espousal.<sup>312</sup> It may also involve disputes and dispute resolution. The initiative function

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<sup>304</sup>KW Abbott and D Snidal, "Why States Act through Formal International Organisations" (1998) *Journal of Conflict Resolutions* 3 and 15.

<sup>305</sup>AK Schneider, (n) 179, 735.

<sup>306</sup> *ibid.*

<sup>307</sup>KW Abbot and D Snidal, (n) 304, 13.

<sup>308</sup>AK Schneider, (n) 179, 735.

<sup>309</sup>KW Abbot and D Snidal, (n) 303 12.

<sup>310</sup> AK Schneider, (n) 179, 735.

<sup>311</sup> *ibid.*, 736.

<sup>312</sup>*ibid.*



basically sets the agenda, in addition to conceiving and executing programmes of the organisation.<sup>313</sup> It requires a sophisticated and detailed organisational structure, including a secretariat, as well as a decision and dispute settlement mechanism.<sup>314</sup> The WTO decision and dispute resolution mechanisms is a practical example of the initiative function of international organisations.

Producing organisation, on the other hand, provides gains in efficiency by pooling risks or assets, managing joint production between member states, and reducing transaction costs through the creation of coordination points-rules, standards and specifications.<sup>315</sup>

The functions of an international organisation influence the choice of dispute resolution mechanism to be employed. The initial stages of normative function may consider non-binding methods such as negotiation while the more complex and much more involving initiative function stage may consider binding interventions such as arbitration or courts.

#### (ii) *Level of Economic Integration*

As observed in the preceding part of this thesis, there are at least five typologies/stages of political and economic integration: FTA, Customs Union, Common Market, Economic Union and Political Integration.<sup>316</sup> It has also been observed that the objectives of an integration effort determine the depth or extent of the scope of integration.<sup>317</sup> While some integration efforts aim at achieving full

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<sup>313</sup> *ibid.*

<sup>314</sup> *ibid.*

<sup>315</sup> *ibid.*

<sup>316</sup> Part 2.3 of this chapter. Pelkmans (1986), argues that the five stages of integration outlined by Balassa (1961) miss the important distinction between negative integration- the removal of barriers, and positive integration- the transfer of economic decision making to the union level. J Pelkmans, "The Institutional Economics of the European Integration" (1986) in M Cappelletti et.al (eds) *Integration through Law: The European and the American Federal Experience* (de Gruyter, Berlin, New York) 318, 321, 325-25.

<sup>317</sup> B Balassa, (n) 80, 6.

economic or even political integration, some are satisfied with achieving Custom Union or Common Market status.<sup>318</sup>

The levels of an economic or political integration effort already achieved or aspired invariably impacts the type of dispute resolution regime best suited for the organisation. The level of integration desired by integrating states depend on a variety of factors, but the primary factor in the integration efforts is the desire for economic growth and stability.<sup>319</sup> FTAs may opt for non-formal and non-binding dispute settlement procedures due to the relative independence of member states. Economic Unions or even Common Markets, which are advanced integration efforts with deeper interdependence, may require formal courts for resolution of disputes.

(iii) *Number of Member States*

The number of member states to an international organisation has a direct effect on the organisation's processes including dispute resolution. Negotiation theorists have advanced that multiparty negotiations are more complex than bilateral negotiations.<sup>320</sup> The structure of an international organisation must consider its negotiation complexities. An increased number of members affects how decisions are made, both in the creation of rules and in the resolution of disputes.<sup>321</sup>

Economic gains are also affected by the number of states involved. Trachtman draws a distinction between economic gains and economies of scale.<sup>322</sup> Economies of scale draw from

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<sup>318</sup> B Balassa, *ibid.* See also, R Schuman, "The Schuman Declaration" (1950) reprinted in FN Berch and C Alexander, *The European Union* (1994) 11. Schuman emphasised the economic integration often leads to political stability.

<sup>319</sup> J Trachtman, "The Theory of the Firm and Theory of the International Economic Organisation: Towards comparative Institutional Analysis" (1996-97) 17 *NW.J. INT'L & BUS* 489.

<sup>320</sup> See, for example, H Raiffa, *The Art and Science of Negotiation* (Oxford University Press Oxford 1982) 251-355, at 251. See also, generally, AO Sykes, "Comparative Advantage and the Normative Economics of International Trade Policy" (1998) 1 *J. INT'L ECON. L.* 49.

<sup>321</sup> AK Schneider, (n) 179, 742. B Balassa, (n) 80, 35-39, also discusses the negative and positive impacts of the size of the union on economic gains.

<sup>322</sup> J Trachtman, (n) 319, 498.

global business, global regulation or technological economies of scale.<sup>323</sup> Economic gains and scale increase over time through increased frequency of transactions. Both these benefits depend on the size of the potential economy concerned.<sup>324</sup>

The process of choice of an appropriate dispute resolution mechanism is incremental. In bilateral relations, where only two states are involved, the agreements are less complex and are often ad hoc, or a central oversight body suffices in dealing with disputes.<sup>325</sup> Where several states are concerned, the organisation becomes more complex. The concern with monitoring, harmonisation and compliance will then lead some of these organisations to create oversight, and even judicial bodies. When the agreements are regional in territory, such as the EU, AU or NAFTA, their scope becomes even larger. Separate institutions of oversight, and even judicial bodies become necessary.<sup>326</sup> Global agreements call for a more sophisticated approach to both their organisation and dispute resolution. The WTO is perhaps the best example of a global multilateral trade and trade related dispute resolution system.<sup>327</sup> At the global level, the number of potential disputes exponentially increases. The WTO dispute settlement system, despite its over 20 years of use, is still work under discussion as to its efficacy, including whether non-state actors should be allowed direct access to its dispute settlement mechanism.<sup>328</sup>

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<sup>323</sup> *ibid*, 494-5.

<sup>324</sup> AK Schneider, (n) 178, 745. But see, J Trachtman, note 304 above, where he discusses the limitation of costs – benefit analysis when applied to the conflict between trade values and other values.

<sup>325</sup> TA Guzman, “Why LDCs Sign Treaties that Hurt them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38 *VA. J. International L.L.* 563.

<sup>326</sup> J Trachtman, (n) 319, 495-498.

<sup>327</sup> The current membership of the WTO is 164 with its Dispute Settlement Understanding as its main feature of disputes settlement. <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> accessed on 13<sup>th</sup> December 2018.

<sup>328</sup> See special Issue (1998) WTO Dispute Settlement system, 1 *Journal of International Economic Law* at p. 175; Symposium on the First Three years of the WTO Dispute Settlement System, 32 *Journal of International law* at p. 609. JH Jackson, “Dispute Settlement and the WTO - Emerging Problems” (1998) 1 *Journal of International Economic Law* 329.

(iv) *Similarity in Domestic Economic and Social Levels*

The economic cost-benefit analysis of international organisations requires an examination of the economic and social development of the member states. In a costs-benefit analysis, states enter international organisations in order to reap an advantage.<sup>329</sup> Comparative economic levels between member states impact the evaluation of these costs and benefits to be gained by trading.<sup>330</sup> The notion of equality of states in international law is at best fallacious or utopian; in reality states' economic power and social development cannot be ignored.<sup>331</sup>

Economic power affects the willingness of governments to leave differences open to negotiations. Negotiating for equal power is more comfortable for member states of approximately similar social and economic status.<sup>332</sup> Negotiating imbalances occur where states with unequal economic or social development integrate.<sup>333</sup> Furthermore, the type of dispute resolution mechanism preferred will most likely require a model in which parties have a semblance of parity of arms.<sup>334</sup> Diplomatic methods such as negotiation are favoured by states that are economically more powerful than their trading partners. This is because powerful states can leverage on and link a particular trade dispute to trade in general, economic aid and other economic incentives or pressures.<sup>335</sup>

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<sup>329</sup>AK Schneider, (n) 179, 744.

<sup>330</sup> Trachtman, J (1998) "Trade and... Problems, Cost Benefit Analysis and Subsidiarity", 9 *EUR. J INT'L*. at p.32.

<sup>331</sup> Equality of states is founded in the UN charter Article 2(1) which states that; "The (UN) is based on the principle of the sovereign equality of all its member: see MW Janis, (n) 222, 18, for the preposition that equality of states is more of a theoretical principle than a concept in reality.

<sup>332</sup>AK Schneider, (n) 179, 746.

<sup>333</sup>DR Putman, "Diplomacy and Domestic Policies: The Logic of Two Levels Games" (1988) 42 *INT'L ORG* 427.

<sup>334</sup>WM Doyle, "Liberalisation and World Politics" (1986) 80 *AM.OL.SCI. REV* 1151.

<sup>335</sup>Goodman, (n) 293, 310.

(v) *Type of Government and Legal Culture of Member States*

The system of government not only determines its ability to negotiate, but also its negotiation strategy.<sup>336</sup> The logic is that international organisations would be more stable if they comprise of democratic states.<sup>337</sup> Independence of domestic judiciaries also affect that state's involvement in the international economy.<sup>338</sup>

A democratic government which entrenches values of transparency and independence in its judiciary will ensure political interest groups continue pressurising the government to protect industry; give subsidies and generally influence trade and foreign policy.<sup>339</sup>

Regarding dispute resolution, democracies will be more comfortable with a judicial system that mirrors their own.<sup>340</sup> The respect for the rule of law and independent judiciaries are far more ingrained in integration efforts of states that already have those systems domestically. Non-democratic states are more likely to be suspicious of any judicial system utilising a “western” or “foreign” idea.<sup>341</sup> On the other hand, emerging democracies with controlled economies may fear a foreign body imposing change on the domestic economy too quickly. In totalitarian regimes without a voting public, leaders are less inclined to value the impact of economic interventions to the public.<sup>342</sup> International dispute settlement systems that strengthen and increase the independence of the judiciary, both domestically and internationally, are alien to and may not be

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<sup>336</sup> The AU, EU and MERCOSUR have included the requirement of democracy into their membership standards and treaties. Also see the Preambles to the Constitutive Act of the AU, the EU Rome Treaty and Preamble to the MERCOSUR Protocol of Brasilia for Settlement of Disputes. In 1996, the threatened coup in Paraguay is said to have been partly avoided because of Paraguay's membership of MERCOSUR. See Hall, G.K (1996) “Failed Coup made Bloc Stronger” *J. Com May* at p.1. See also B Fagbayibo, (n) 32, 56-57 for the preposition that politically stable democracies will enhance supranational integration in Africa.

<sup>337</sup> AK Schneider, (n) 179, 755.

<sup>338</sup> *ibid.*

<sup>339</sup> *ibid.*

<sup>340</sup> *ibid.*

<sup>341</sup> *ibid.*

<sup>342</sup> *ibid.*, 752.

embraced by totalitarian governments. Unlike democracies, totalitarian regimes find the loss of sovereignty to a supranational juridical organ threatening.<sup>343</sup>

## **2.5 Summary**

This Chapter addressed the fundamental concepts and theories on which this thesis is built. It has been established that the three principal theories that generally inform integration arrangements in Africa are intergovernmentalism, functionalism and supranationalism. Most of the economic integration efforts in Africa prefer intergovernmentalism with limited experiments in establishing supranational organs within the intergovernmental integration organs' super-structure. This approach has also been adopted in fashioning the dispute resolution systems crafted and employed by African economic integration arrangements.

Furthermore, the chapter analysed, at a theoretical level, the various dispute resolution mechanisms used in resolving international trade and investment disputes at regional and sub-regional levels. Moreover, both formal and non-formal systems have been highlighted. The factors and reasons affecting choice of dispute settlement methods and the salient attributes of each method were also discussed. This discourse sets a conceptual foundation for a discussion on specific dispute settlement approaches taken in the African continental and sub-regional economic regionalism that now follows.

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<sup>343</sup> *ibid.*

## **CHAPTER THREE**

### **DISPUTE RESOLUTION UNDER ECONOMIC REGIONALISM IN AFRICA**

#### **3.1 Introduction**

As observed in the aforementioned chapters, integration does not occur in a vacuum. It exists in social, economic and political contexts. Discussions on integration efforts in Africa often start with the post-independence era. While that may be true for economic integration efforts, the Pan-African inspired integration of the continent preceded the independence period. It is for this reason that the discussion of integration of the African continent begins in the colonial era.

Three periods of significant integration of the continent, also known as waves of regionalism, are identified and discussed in this chapter. The first one was experienced in the 1960s when most African states gained independence. The second wave came about after the end of the cold-war era. The third wave is associated with the period following the transformation of the OAU to the AU. Foregrounding of the historical evolution of integration on the continent will, therefore, offer a useful backdrop and context to the discussion to follow.

The integration of the continent has primarily been at two levels: continental and at the sub-regional / REC levels. This chapter will also focus on the economic integration of the continent at these two levels. Particular attention will be paid to the role of dispute resolution systems set up by the various integration bodies and their contribution to the economic integration of the region or sub-region. Additionally, and of equal importance, will be to establish whether the dispute resolution or adjudicative organs engender intergovernmentalism or supranationalism as detailed in the foregoing part of this chapter.

#### **3.2 Historical background to Integration in Africa**

##### ***3.2.1 Pre-Independence Era***

According to Sougrynoma, there are three main turning points in the history of the African Union: the conception of the philosophy of pan-Africanism; the institutionalisation of pan-Africanism and

the creation of the African Union.<sup>344</sup> Although these events span a period of over 40 years, they bear one common denominator: pan-Africanism. Pan-Africanism runs through the entire edifice of the OAU/AU instruments and efforts. It is an enduring rallying call to African unity and cohesion, both in the political and economic spheres.

In the colonial era, W.E.B Du Bois championed pan-Africanism or the pan-African movement.<sup>345</sup> He defined pan-Africanism as a movement based on three fundamental ingredients: shared racial, historical and economic bonds; commitment to gaining economic and political self-rule for the colonised; and symbolised in a worldwide union of people of colour.<sup>346</sup> Egypt, Ghana, Nigeria, and Tanzania were some of the earliest African countries to gain independence.<sup>347</sup> After gaining independence in 1957, the then President of Ghana, Kwame Nkrumah became a prominent advocate of Pan-Africanism. He was of the view that for Africa to develop, prosper and forever deal with colonialism, it was imperative to form a united Africa.<sup>348</sup> This view, coming in the twilight days of colonialism and at the height of independence movements in Africa, was very popular. Nkrumah was supported by then Tanzanian President Nyerere and Egypt's Gamal Abdel Nasser.<sup>349</sup> The idea of a united Africa birthed the OAU.

In the early 1960s, two schools of thought took root on the approach towards the integration of the African continent. Nkrumah led a group of “radicals” christened “the Casablanca group”

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<sup>344</sup> Sore and Z Sougrynoma, “Establishing Regional Integration: The African Union and the European Union” (2010) 25(13) *Macalester International*, 1-29, at 3-5.

<sup>345</sup> GA Agbango, “Issues and Trends in Contemporary African Politics: Stability, Development and Democratization” (1998) *Peter Lang* 67.

<sup>346</sup> *ibid.*

<sup>347</sup> *ibid.* Egypt gained independence in 1953, Ghana in 1957 and Tanzania in 1961.

<sup>348</sup> A Badre, “Supranational Integration versus Intergovernmental Structure: The European Union versus the African Union” (2014) 1(11) *Fourth Global International Studies Conference, Goethe University*  
[https://www.researchgate.net/publication/315655664\\_Supranational\\_Integration\\_Versus\\_Intergovernmental\\_Structure\\_The\\_European\\_Union\\_vs\\_the\\_African\\_Union](https://www.researchgate.net/publication/315655664_Supranational_Integration_Versus_Intergovernmental_Structure_The_European_Union_vs_the_African_Union), accessed on 23<sup>rd</sup> September 2019.

<sup>349</sup> *ibid.*



who advanced a compelling argument for the way forward.<sup>350</sup> Nkrumah envisioned an Africa in which:

[t]he entire continent agreed to a common market, a single currency, an African Central Bank, a common foreign policy, a common defence system and a common citizenship amongst others.<sup>351</sup>

The other group, led by Nyerere, advocated for an approach that favoured a gradual integration of the continent through sub-regional bodies. Nyerere advanced that:

Many of us in East Africa believe that our best path to Unity may be through a regional association. This would bring us some immediate strengthening of our economies at the same time as showing our people the benefits of unity. A federation of at least Kenya, Uganda, and Tanganyika should be comparatively easy to achieve. We already have a common market, and run many services through the Common Services Organisation - which has its own Legislative Assembly and an executive composed of the Prime Ministers of the three states.<sup>352</sup>

### ***3.2.2 Post-Independence Era: The First Wave of Economic Integration***

After most African states had gained self-rule, the rallying call for a united Africa substantially waned.<sup>353</sup> The new African leaders had to grapple with internal strife, assassinations and upheavals, to the extent that the pre-colonial idea of a continental unity government became either

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<sup>350</sup> CT Ekwealor, "United States of Africa and Conundrums" (2018) 5(1) *Journal of African Foreign Affairs* 27.

<sup>351</sup> Kwame Nkrumah's speech at the occasion of the establishment of the OAU, on 25<sup>th</sup> May 1963 in Addis Ababa, Ethiopia, quoted in S Benienuba, (2013) *Where is Nkrumah's United States of Africa 50 years on?* <https://www.pambazuka.org/pan-africanism/where-nkrumah%E2%80%99s-united-states-africa-50-years>. accessed on 17<sup>th</sup> December 2018. See generally, B Fagbayibo, "Nkrumahism, Agenda 2063, and the Role of Intergovernmental Institutions in fast tracking Continental Unity" (2018) 53(4) *Journal of Asian and African Studies* 629-642. See also, K Nkrumah, *Africa Must Unite* (Fredrick A. Praeger, New York 1963) 132-172.

<sup>352</sup> J Nyerere, "A United States of Africa" (1963) 1(1) *The Journal of Modern African Studies* 1.

<sup>353</sup> *ibid*, 12. The assassination of the first Togolese President, Sylvanus Olympio in 1963 is one event that led to fear among African leaders at that time.

unpopular or simply unattractive to most African leaders.<sup>354</sup> To create a middle ground, and to keep the idea of African unity alive, the OAU Charter was signed in May 1963. The Charter provided that the OAU and its member states shall not interfere in internal affairs of other member states.<sup>355</sup> This sounded the death knell on the dream of a politically united Africa.<sup>356</sup>

In the 1960s, regional integration was perceived largely as an instrument for safeguarding recently acquired political freedom, and as a strategy to be used to facilitate economic development.<sup>357</sup> The focus seems to have shifted to a more economically inclined approach to integration as opposed to political unity favoured in the pre-colonial epoch.

According to Nye Jr, although the post-independence 1960s approach to integration gravitated towards economic objectives, its pan-African roots did not completely disappear.<sup>358</sup> For example, there was the Pan-African Congress, in 1974, convened in Tanzania and hosted by President Nyerere. The Congress sought to mobilise Africa and its diaspora in support of the liberation of South Africa and cooperation in the agriculture; health and nutrition; research in science and technology; communications; political cooperation and support for the liberation movements in Africa.<sup>359</sup>

During this era, the Lagos Plan of Action (LPA), the Lagos Final Act (1980) (LFA) and Africa's Priority Programme for Economic Recovery (1985) (APPER) were launched as special

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<sup>354</sup>ibid.

<sup>355</sup> See Article 2.2 of the OAU Charter.

<sup>356</sup> See, A Burja, (2002). "Transition from OAU to the AU" (2012) *ACARTSOD*, Tripoli, Libya, quoted in A Badre, (n) 348.

<sup>357</sup>J de Melo, "Regional Integration Agreements in Africa: Is Large Membership the Way Forward?" (2015) *Africa Focus* 16(5) 2. See also, R Mukamunana and K Moeti, "Challenges of Regional Integration in Africa: Policy and Administrative Implications" (2005) *Journal of Public Administration* 90.

<sup>358</sup>JS Nye, *Pan Africanism and the East African Integration* (Harvard University Press Cambridge 1965) 3-28. See also, generally, T Muriithi, *The African Union: Pan-Africanism, Peace Building and Development* (Ashgate Publishing Hampshire 2005).

<sup>359</sup> S Hill, *From the Sixth Pan-African Congress to the Free South Africa Movement* available at [http://www.noeasyvictories.org/select/08\\_hill.php](http://www.noeasyvictories.org/select/08_hill.php) accessed on 20<sup>th</sup> September 2018.

initiatives of the OAU.<sup>360</sup> Their common objective was to play “a major development role to regional economic cooperation and integration.”<sup>361</sup> The LPA envisaged the establishment of three regional arrangements aimed at creating separate but convergent and overarching integration arrangements in the sub-Saharan Africa region.<sup>362</sup> This resulted in the establishment of the Economic Community of West African States (ECOWAS) in West Africa, PTA (which subsequently became the COMESA), the Economic Community of Central African States (ECCAS), together with the then already established Arab Maghreb Union (AMU) in North Africa. According to the LPA, these sub-regional economic integration communities were to evolve into an integrated African economy. It is pursuant to this plan that the AEC Treaty was concluded in 1991.

Mistry argues that the first wave of economic integration failed due to cold war external influences as well as the failure of the post-independence African development model.<sup>363</sup> He further points out that this model, in most sectors, involved national parastatal enterprises with non-commercial objectives that were mostly concerned with national issues, which in turn inhibited integration.<sup>364</sup> The implementation and design of the integration arrangements, which stressed cooperation by state agencies as opposed to attraction of foreign investment and open trade, was largely ineffective.<sup>365</sup>

### ***3.2.3 1991-2001 Era: The Second Wave of Economic Integration***

Before 1990, and in the years of the capitalism-socialism divide, both ideological blocs scrambled for allies across the world, including in Africa. The ultimate goal of the West was to ensure no

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<sup>360</sup> Texts of the plans and programmes are <<https://au.int/en/resources/filter>> accessed on 20<sup>th</sup> September 2018.

<sup>361</sup>SKB Asante, “The Need for Regional Integration: A Challenge for Africa” (1995) 22(6) *Review of African Political Economy* 574.

<sup>362</sup>C McCarthy, “Reconsidering the Africa Regional Integration Paradigm” (2010) 9(2) *Trade Negotiations Insights*, <<https://www.ictsd.org/bridges-news/trade-negotiations-insights/news/reconsidering-the-african-regional-integration.>> accessed on 12<sup>th</sup> November 2018. Article 25 (Chapter VII) of the LPA was specific in the establishment of RECs in Africa for growth of intra- Africa trade.

<sup>363</sup>PS Mistry, “Africa’s record of Regional Cooperation and Integration” (2000) 99 *African Affairs* 553-573, at 557.

<sup>364</sup> *ibid.*

<sup>365</sup> *ibid.*, 571.

form of socialist order took root. In turn, the western powers turned a blind eye to the violations of human rights that occurred under the rule of despotic leaders who were their allies.<sup>366</sup> As a consequence, the OAU watched helplessly because of the principle of non-interference with the internal affairs of member States.

At the end of the cold war, Africa had to realign itself to the new world order and its challenges. Capitalist notions of free markets and democracy saw many African economies sink deep into recession as despots were removed from power through multi-party elections.<sup>367</sup> It is in this context that the AEC Treaty was concluded.

The AEC Treaty was adopted by the then OAU member states in the year 1991. Its primary role was to incrementally integrate African Markets into a supranational economic order known as the African Economic Community.<sup>368</sup> This was to be achieved gradually, leveraging on existing RECs.<sup>369</sup> The realities of the new world order required economic unity of the continent so as to achieve economic prosperity.

This period saw the transformation of previously moribund Free Trade Area Agreements into Common markets and the proliferation and transformation of RECs across Africa. SADCC transformed into SADC and the East African Cooperation transformed into the East African Community (EAC).<sup>370</sup> The Intergovernmental Authority on Development (IGAD) replaced the

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<sup>366</sup>A case in point, in the Congo, was when the populist revolutionary Prime Minister Patrice Lumumba was assassinated by his successor, Mobutu Sese Seko. See A Badre (n) 119 above. See also, Bustin and Edouard, “The Assassination of Lumumba” (2001) in Ludo de Witte; Ann Wright; Renee Fenby. *The International Journal of African Historical Studies* (2001) 43(1) *Boston University African Studies Centre* 177-185.

<sup>367</sup>O Adebayo, “Changing Patterns of Politics in Africa” (2017) 34 *Cadernos de Estudos Africanos* 15-38.

<sup>368</sup> See the Preamble to the AEC Treaty

<sup>369</sup> See the preamble, Article 4 and 6 of the AEC Treaty.

<sup>370</sup> SADC, established in 1981, transformed into SADC on 17<sup>th</sup> August 1992 in Windhoek, Namibia where the SADC Treaty was adopted. The East African Community transformed from the East African Cooperation on 30<sup>th</sup> November 1999 and the Treaty signed in Arusha, Tanzania came into force in 2000. See <<https://www.sadc.int/about-sadc/>; <https://www.eac.int/>> accessed on 20<sup>th</sup> September 25, 2018.

Intergovernmental Authority on Drought and Development (IGAD).<sup>371</sup> Economic and Monetary Communities/Unions such as the Central African Economic and Monetary Community (CEMAC) and the West African Economic and Monetary Community (WAEMU) were created.<sup>372</sup> New supranational economic organisations such as OHADA were also created.<sup>373</sup> This flurry of activities in the economic integration arena is what was regarded as the second wave of regional integration.

### ***3.2.4 The Post 2001 Era: The Third Wave of Economic Integration***

The most significant feature of this period was the adoption of the Constitutive Act of the AU to replace the OAU Charter.<sup>374</sup> The Constitutive Act of the AU redresses the principle of non-interference with the internal affairs of member states, albeit to a limited extent.<sup>375</sup> It also acknowledges and adopts the economic integration model provided in the AEC Treaty, with RECs used as building blocks towards the envisaged African Economic Community.

The pan-African spirit still featured among the key motives of the transformation of the OAU into the AU.<sup>376</sup> The renewed voices calling for African unity were led by three charismatic African Presidents, namely: Muammar Gaddafi of Libya; Thabo Mbeki of South Africa; and Olusegun Obasanjo of Nigeria.<sup>377</sup> Just like in the 1960s, the African unity agenda had to rely on

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<sup>371</sup> Launched in 1996 at a Summit of Heads of State and Government held on 25<sup>th</sup> November 1996 in Djibouti. <https://igad.int/about-us>, accessed on 20<sup>th</sup> September 2018.

<sup>372</sup> In 1994, CEMAC replaced the Customs and Economic Union of Central Africa (UDEAC); WAEMU was established by the UEMOA/WAEMU Treaty in 1994.

<sup>373</sup> OHADA was established by Treaty in 1993.

<sup>374</sup> The OAU transformed into the AU on 9<sup>th</sup> September 1999 at an extra ordinary session of the OAU held in Sirte, Libya.

<sup>375</sup> Article 4 (h) provides for “the right of the Union to intervene in a member State Pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”

<sup>376</sup> See the Preamble, 2 and 3, and Article 3 (j) and (i) of the Constitutive Act of the AU.

<sup>377</sup> A Biney, “The Legacy of Kwame Nkrumah in Retrospect” (2008) 2(3) *Journal of Pan African Studies* 129-159.

the desire, drive and motivation of prominent and charismatic leaders for substantive progress to materialise.<sup>378</sup>

Forty years later, the debate on the unity of the African continent was revived by President Gaddafi. With Gaddafi as champion, the dream of a united Africa seems to have survived the death of its main proponents, Nkrumah and Nyerere.<sup>379</sup> Gaddafi resurrected the debate on African unity in the lead up to the creation of the AU in 2001. Gaddafi seemed to read from the same script as Nkrumah did in the 1960s. He envisaged that “Africa will only truly be powerful once it is led by one strong government that actually pushed for the creation of the United States of Africa to boost the continent’s international voice.”<sup>380</sup> Like many pan-Africanists before him, Gaddafi viewed African boundaries as arbitrary relics of colonial imperialism that did not appreciate Africa’s ethnic and cultural similarities.<sup>381</sup> To him, a united Africa would give birth to true African freedom and dignity.<sup>382</sup>

Totolo observes that Gaddafi’s “United States of Africa” would be a federation of countries with one government, one currency, one passport and one army.<sup>383</sup> Gaddafi’s views were moderated by his participation in the formation of the Arab Maghreb Union (AMU). This was seen

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<sup>378</sup> For example, initiatives such as the New Partnership for Africa’s development (NEPAD) and the African Peer Review Mechanism (APRM), attributed to the former Presidents Olusegun Obasanjo and Thabo Mbeki, have struggled to have impetus and have dissipated in efficacy since the retirement of both Presidents. See, B Fagbayibo (n) 32, 49.

<sup>379</sup> CA Parker and D Rukare, “The New African Union and its Constitutive Act” (2002) 96(2) *American Journal of International Law* 365. See also, MS Rajan, “Sovereignty of States and Intervention” (2003) 40(3) *International Studies* 277.

<sup>380</sup> M Ramutsindela, “Gaddafi, Continentalism and Sovereignty in Africa” (2009) 91(1) *South African Geographical Journal* 10.

<sup>381</sup> *ibid.*

<sup>382</sup> C T Ekwealor, (n) 350, 28.

<sup>383</sup> E Totolo, “Gaddafi’s Grand Plan” *Zurich Centre for Security Studies* (2009) <<https://css.ethz.ch/en/services/digital-library/articles/article.html/101447/pdf>> accessed on 17<sup>th</sup> December 2018, 1.

as an acknowledgement that continental integration would have to be incrementally built through sub-regional RECs.<sup>384</sup>

Gaddafi experimented with a top-to-bottom approach to integration by financing the implementation of strategic continental projects that would, in his view, accelerate Africa's Unity.<sup>385</sup> In reaction to this, according to Pougala, the United States of America (U.S) government froze US\$30 million belonging to the Libyan Central Bank.<sup>386</sup> The reasons given by the U.S. were that it sought to "deprive Gaddafi and his government of the ability to siphon funds for personal gain, prevent further bloodshed in Libya, and secure the state's assets for the benefit of Libyans when a future government is implemented."<sup>387</sup>

During this period, significant developments on the economic integration front have also been witnessed. Pursuant to the AEC Treaty, the African Continental Free Trade Area (AfCFTA) Agreement has been signed by 44 African States, creating a continental Free Trade Area as a first step to continental economic integration.<sup>388</sup> At the sub-regional level, the Tripartite Free Trade Area (TFTA), which merges the three sub-regional RECs of COMESA, EAC and SADC, was

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<sup>384</sup> C T Ekwealor, (n)350, 29.

<sup>385</sup> These included a \$300 million donation towards a continental satellite in 2007. Gaddafi bankrolled the AU by meeting up to 15% of its expenses and helping countries like Chad, Niger and Malawi pay up their AU subscription arrears. See, J Pougala, "Why the West Wants the Fall of Gaddafi" (2011) <<https://dissidentvoice.org/2011/04/why-is-gaddafi-being-demonized/>> accessed on 17<sup>th</sup> December 2018, 2. See also, T Gwaambuka, "Muammar Gaddafi and the United States of Africa" (2016) <<https://www.africanexponent.com/post/muammar-gaddafi-and-the-united-states-of-africa-2239.>> accessed on 17<sup>th</sup> December 2018. See generally, B Fagbayibo, "The Libyan Revolution: Thoughts on Post-Gaddafi era of African Integration" (2013) *Consultancy African Intelligence (CIA) Discussion paper* <<https://www.polity.org.za/article/the-libyan-revolution-thoughts-on-a-post-gaddafi-era-of-african-integration-2011-09-16.>> accessed on 17<sup>th</sup> December 2018.

<sup>386</sup> For example, Gaddafi initiated three flagship projects: The African Investment bank in Sirte, Libya, the African Monetary Fund (AMF) to be based in Yaoundé, Cameroon, with a \$42 billion capital fund and an African Central Bank (ACB) in Nigeria. See, J Pougala, *ibid*.

<sup>387</sup> CT Ekwealor, (n) 350, 31.

<sup>388</sup> The AfCFTA Agreement was signed together Protocols to the Abuja AEC Treaty, On Free Movement of Persons, Right of Residence and Right of Establishment. Text <<https://au.int/en/treaties/protocol-treaty-establishing-african-economic-community-relating-free-movement-persons.>> accessed on 20<sup>th</sup> September 2018.

established in 2015.<sup>389</sup> The TFTA is expected to feed into the grand plan of the AEC by the gradual amalgamation of the economies of its member RECs, with the goals of forming a Common Market and, ultimately, a Customs Union.<sup>390</sup>

The post-2001 integration of the continent seems to be focused, largely, on economic integration, entrenching good governance and democracy, and the merging of markets with common rules. The AEC Treaty also envisages the strengthening of existing RECs and creating new ones where none existed.<sup>391</sup> Apart from the new RECs, existing RECs have deepened their integration with many achieving Customs Unions, Common Markets and even Monetary Unions.<sup>392</sup>

Some scholars have averred that with Gaddafi's death, the burden of pushing the "United States of Africa" agenda fell to the late former president of Zimbabwe, Robert Mugabe.<sup>393</sup> Mugabe lacked the energy and financial clout that Gaddafi possessed. In effect, Gaddafi's death also marked the death of the idea of a "United States of Africa."<sup>394</sup> One may counter this argument by suggesting that recent AU initiatives such as the Agenda 2063 and NEPAD are underway. However, several decades of NEPAD and Agenda 2063 have hardly realised the desired results, largely due to lack of pragmatic championship of strong African leaders like the previous initiatives.

There are other recent important efforts by President Paul Kagame of Rwanda, and the immediate former Chairperson of the AU. During his tenure as AU Chairperson in 2018, he

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<sup>389</sup>The Tripartite Free Trade Area Agreement brings together 26 Member States of COMESA, SADC and the EAC and was signed in Sharm-el-Sheikh, Egypt on 10<sup>th</sup> June 2015. See D Luke and Z Mabuza, "The Tripartite Free Trade Area Agreement: Milestone for Africa's Integration Process" (2015) 4 *Bridges Africa* 6.

<sup>390</sup> Luke and Mabuza, *ibid*, 1.

<sup>391</sup> Article 6 of the AEC Treaty.

<sup>392</sup> For example, both the EAC, ECOWAS have established Monetary Union Agreements; while COMESA and the EAC are now Common Markets. The evolution of African Sub-regional RECs, as they relate to dispute resolution as discussed in part 3.3 of this Chapter.

<sup>393</sup> For example, CT Ekwealor, (n) 350, 31.

<sup>394</sup> *ibid*.



advanced an elaborate and ambitious plan to transform the AU, premised on pan-Africanism.<sup>395</sup> The plan advocated for the self-reliance of the AU, deeper trade and investment integration, and promotion of intra-Africa trade.<sup>396</sup> Prioritising key AU projects that have an impact on the ground, and a self-financing model for the AU operations and projects are some of the central planks of the Kagame Report.<sup>397</sup> Kagame's critics have advanced that he lacks the democratic credentials to champion the AU's transformation.<sup>398</sup> Turianskyi and Gruzd argue that it was Kagame's personality and record of being efficient that positioned him as the natural choice to lead the AU reform process.<sup>399</sup> They also advance that it has become almost a necessity that reforms in the AU are led by a strong charismatic political leader, as has happened previously through former AU Chairmen and Presidents as did his predecessors, Gaddafi, Obasanjo and Thabo Mbeki.<sup>400</sup> However, as it invariably happens in Africa, noble ideas do not survive the exit from office of their championing leaders.

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<sup>395</sup> The plan is contained in an AU report titled "Imperative to Strengthen Our Union: Report on the Proposed Recommendations on Institutional Reform of the African Union", also simply known as the "Kagame Report". <<https://au.int/sites/default/files/pages/34871-file-report-20institutional20reform20of20the20au-2.pdf>> accessed on 19<sup>th</sup> September 2019. For a discussion on the proposals and their objectives, see generally, K Pharatlathe and J Vanheukelom, "Financing the African Union: On Mind-sets and the Money" (2019) *European Centre for Development Policy Discussion Paper No.240* <<https://ecdpm.org/wp-content/uploads/DP240-Financing-the-African-Union-on-mindsets-and-money.pdf>> accessed on 21<sup>st</sup> September 2019

<sup>396</sup> *ibid.*

<sup>397</sup> *ibid.* For a discussion on ideas that would promote the acceptance and sustainability of the self-financing measures of the AU, see B Fagbayibo, "The Africa Union's Self Financing Agenda: Three Ideational Measures that should Guide it" (2 April 2019) *Africaportal* available at <<https://www.africaportal.org/features/african-unions-self-financing-agenda-3-ideational-measures-should-guide-it/>> accessed on 20<sup>th</sup> September 2019.

<sup>398</sup> Y Turianskyi, "Kagame AU Reforms Will Struggle to Survive without him" (2019) <<https://mg.co.za/article/2019-02-23-00-kagames-au-reforms-will-struggle-to-survive-without-him>> accessed on 20<sup>th</sup> September 2019.

<sup>399</sup> Y Turianskyi and S Gruzd, "The Kagame Reforms of the AU: Will they Stick?" (2019) *South African Institute of International Affairs SAIIA Occasional Paper no. 299* <<https://saiia.org.za/research/the-kagame-reforms-of-the-au-will-they-stick/>> accessed on 20<sup>th</sup> September 2019, 7-8.

<sup>400</sup> Y Turianskyi (n) 398. The NEPAD initiative has largely become moribund after the exit of Presidents Obasanjo and Mbeki from office. NEPAD has since been subsumed into the AU superstructure as an Agency. See note, 4 above.

### 3.3. Continental Economic Regionalism and Dispute Resolution

#### 3.3.1 *The African Economic Community (AEC)*

The Abuja Treaty, establishing the AEC, has its roots in the pan-African political aspirations of an economically and politically united Africa.<sup>401</sup> The treaty acknowledges the substantial efforts already made at sub-regional and regional levels towards economic integration.<sup>402</sup> Thus, the treaty further provides that the community shall, by stages, ensure the strengthening of existing RECs and the establishment of new ones where none exist.<sup>403</sup>

As an economic bloc, the AEC treaty also enjoins its members to eventually harmonise their national policies in order to promote economic activities.<sup>404</sup> This is intended to be achieved through traditional integration models such as the adoption of a common trade policy vis-à-vis third states, establishment and maintenance of a common external tariff and common market.<sup>405</sup> The members are also expected to gradually reduce tariff and non-tariff barriers to trade and encourage free movement of goods and services within the community. Notably, the treaty also provides for affirmative action for land locked, semi-land locked, least developed and islands countries.<sup>406</sup>

The establishment of the AEC is to be implemented and achieved through a gradual and step-wise approach, with six stages of varying durations, including a 34-year transition period.<sup>407</sup> RECs have been given special focus by the AEC Treaty, with an entire chapter dedicated to their place, functions, as well as an emphasis on the strengthening of existing RECs and establishing new ones where none exist.<sup>408</sup>

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<sup>401</sup> See the preamble to AEC treaty. See also, K Danso, “The African Economic Community: Problems and Prospects” (1993) 41 *Africa Today*, 31-55, at 31-32.

<sup>402</sup> Article 5.

<sup>403</sup> Article 4 (2) (a).

<sup>404</sup> Article 4(2) e.

<sup>405</sup> Article 4(2) (f) and (g).

<sup>406</sup> Article 4 (2) (i).

<sup>407</sup> Article 6. These stages have been discussed in chapter 1 of this thesis.

<sup>408</sup> Articles 75 and 76.

### **3.3.1.1 Structure, Organs and Institutions of the AEC**

The organs of the community include the Assembly of Heads of States and Government which is the apex and supreme organ of the community.<sup>409</sup> Beneath it is the Council of Ministers which is responsible for the functioning and development of the community at a policy level.<sup>410</sup> Also established is a Pan-African Parliament whose role is left to a future protocol to define its composition, functions, powers and organisation.<sup>411</sup> This has since been achieved with the establishment in 2004 of the Pan African Parliament (PAP).<sup>412</sup>

Included is the Economic and Social Commission consisting of ministers responsible for economic development, planning and integration of members.<sup>413</sup> The Commission reports to the Council of Ministers and makes recommendations to the Assembly of Heads of State and Government. Moreover, the Commission is the technical policy vehicle of the community.

A secretariat, headed by the Secretary General, is charged with the day to day operations of the community, the implementation of decisions of the Council of Ministers and the Assembly of Heads of State and Government, and is charged with projects of the community, including their monitoring.<sup>414</sup> Specialised Technical Committees (STCs) composed of members with relevant expertise, in specific strategic areas, originate projects and concepts. STCs also recommend the same to the Assembly through the Council of Ministers and Secretariat. The committees are also tasked with assessing the viability of projects, their execution and coordination.<sup>415</sup>

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<sup>409</sup> Article 7 and 8.

<sup>410</sup> Article 11, 12 and 13.

<sup>411</sup> Article 14.

<sup>412</sup> Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament

<<https://au.int/en/treaties/protocol-constitutive-act-african-union-relating-pan-african-parliament>.> accessed on 20<sup>th</sup> September 2018.

<sup>413</sup> Article 15 and 16.

<sup>414</sup> Article 21 and 22.

<sup>415</sup> Chapter IV Article 28.

The AEC Treaty also established the Court of Justice of the Community.<sup>416</sup> However, this has been superseded by the creation of the ACJ&HR which created the single AU Court.

### ***3.3.1.2 The Place of the ACJ&HR (the AU Single Court) under Africa's Economic Regionalism***

Article 18 of the Constitutive Act of the AU establishes the AU Court of Justice as one of the organs of the Union. The Court was established as the principal judicial organ of the AU with jurisdiction to decide over disputes on the interpretation and application of AU treaties.<sup>417</sup> The African Court of Human and Peoples' Rights had earlier been established by Protocol in 1998.<sup>418</sup> In July 2004, the AU Assembly resolved to merge the two courts into a single court in order to ensure that adequate resources are available to fund the continental single court.<sup>419</sup>

The ACJ&HR is governed by two main instruments: the Protocol and Statute of the Court of Justice and Human Rights. The Protocol deals with establishment and transitional matters, such as replacing the previous courts and forming of the single court. Furthermore, the Statute to the Protocol defines the court's jurisdiction, composition and procedural matters. A protocol amending the Statute of the Court was adopted on 14<sup>th</sup> July 2014.<sup>420</sup>

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<sup>416</sup> Chapter IV Article 28.

<sup>417</sup> Article 5 of the Constitutive Act of the AU.

<sup>418</sup> Protocol to the African Charter on Human and Peoples' Rights, adopted by the then Members of the OAU in Ouagadougou, Burkina Faso, in June, 1998. The protocol came into force on 25<sup>th</sup> June 2004. The first judges were appointed in 2006.

<sup>419</sup> See paragraphs 4 and 8 of the Preamble to the Statute of the African Court of Justice and Human Rights. Available at <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> Visited on 16<sup>th</sup> September 2018.

<sup>420</sup> The Protocol Amending the Statute of the African Court of Justice and Human Rights. The Protocol is yet to come into effect since it has not yet received the requisite 15 ratifications. See the status of the Protocol at [https://au.int/sites/default/files/treaties/36396protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights.pdf](https://au.int/sites/default/files/treaties/36396protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf) accessed 18<sup>th</sup> September 2018.

### **3.3.1.2.1 *Structure of the ACJ&HR***

The Protocol of the Court creates two sections: a General Affairs Section and a Human Rights Section; each composed of eight judges.<sup>421</sup> The Amendment Protocol creates a third section, the International Criminal law Section.<sup>422</sup> The General Affairs Section will hear all matters except those concerning Human and Peoples' Rights.<sup>423</sup> The Human Rights Section will hear all matters relating to Human and Peoples' Rights.<sup>424</sup> The International Criminal law Section shall have the power to try persons for international crimes, war crimes and crimes against humanity, as detailed in article 28A of the Amendment Protocol.<sup>425</sup>

Article 4 of the Statute requires judges to be impartial and independent persons of high moral character, who possess the qualifications required in their respective countries, for appointment to the highest judicial offices, or juris-consults of recognised competence in international law and /or human rights law. Article 3 of the Amendment Protocol on the Court's Statute includes a further qualification in international humanitarian law.

Interestingly, both the statute of the Court and the Amendment Protocol seem to heavily slant towards expertise in human rights, international criminal and humanitarian law in the qualification of the persons who should sit as judges of the ACJ&HR. Apart from general expertise in international law, the judges expected to sit in the General Section of the Court are not required to possess any expertise in international trade and investment law.

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<sup>421</sup>Article 16 of the Statute of the African Court of Justice and Human Rights. Article 2 of the Amendment Protocol now requires that there is gender equity in the composition of the court.

<sup>422</sup> Article 9 of the Amendment Protocol.

<sup>423</sup>*ibid*, Article 17 (1).

<sup>424</sup>*ibid* Article 17 (2).

<sup>425</sup> These include Genocide, piracy, unconstitutional change of Government, terrorism, corruption, mercenarism, drug and human trafficking and aggression.

### **3.3.1.2.2 *Jurisdiction of the ACJ&HR***

On the surface, the jurisdiction of the Human Rights and International Criminal Law Sections of the court seem to be well defined, both in detail and scope, while the General Affairs Section is left wide open. Whether by design or default, the impression created is that the architecture of the court is more inclined towards human rights and international criminal law as opposed to trade and investment matters.

The jurisdiction of the ACJ&HR can be divided into three sub-sets: subject matter jurisdiction, jurisdiction personae, and advisory jurisdiction. Article 28 of the ACJ&HR Protocol combines the subject matter jurisdiction of the former Human and Peoples' Rights Court and the Court of Justice, now merged. Consequently, the single Court shall have jurisdiction over the following subject matters:<sup>426</sup>

- a) The interpretation and application of the Constitutive Act of the AU;
- b) The interpretation, application and validity of other AU Treaties and all subsidiary legal instruments adopted within the framework of the AU;
- c) The interpretation and application of other legal instruments relating to human rights ratified by state parties concerned;
- d) Any question of international law;
- e) All acts, decisions, regulations and directives of the organs of the AU;
- f) All matters specifically provided for in any other agreements that State Parties may conclude among themselves, or with the AU which confer jurisdiction on the African Court;
- g) The existence of any fact which; if established, would constitute a breach of an obligation owed to a state party or to the AU;
- h) The nature of the reparations to be made for breach of an international obligation.

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<sup>426</sup>These include: the African Charter on Human and Peoples' Rights (Banjul charter); the Charter on the Right and Welfare of the Child; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa or other legal instruments relating to human rights ratified by the state parties concerned.

Article 3 of the Amendment Protocol expands the jurisdiction of the Court to include international crimes and appeals from RECs, international organisations and inter-member state agreements. It is difficult, however, to discern how this expanded jurisdiction will sit with REC dispute resolution organs, some of which exercise appellate jurisdiction from member national courts and proclaim finality of their decisions under their establishing instruments.<sup>427</sup>

The ACJ&HR Protocol and Statute do not seem to confer the Court with exclusive jurisdiction over matters relating to the interpretation and application of the Constitutive Act of the AU and all its treaties, protocols, agreements, conventions, acts, decisions. This omission goes to the heart of the mandate of the court, which is supposed to be the single AU court and should, therefore, speak with finality on the Union's matters. The absence of supremacy of the Court and its decisions over sub-regional and national Courts and judicial tribunals is further compounded by the Article 46 H (1) of the Amendment Protocol. The provision states that the jurisdiction of the Court is complementary to that of the national courts, and courts of the RECs, where the same is specifically provided by the RECs. This means that the ACJ&HR Protocol acknowledges being a court; equal in stature, status and competence with national courts and REC judicial organs.

Article 46H (2) and (3) of the Amendment Protocol addresses admissibility of cases by the ACJ&HR. The provision seems to suggest that the court will only exercise jurisdiction upon either exhaustion of local remedies (national and REC) or where it is demonstrated that the state member is unwilling or unable to investigate or prosecute. Though largely speaking to the human rights or international crimes jurisdiction of the court, the provision highlights the applicability of the subsidiarity principle in the African continental dispute resolution system.

The principle of jurisdiction *personae* essentially answers the question: who has the competence to bring cases to a court or tribunal? Articles 29 and 30 of the Statute of the ACJ&HR enumerate the persons with the right to access the Court. These are: state parties to the ACJ&HR Protocol; the Assembly, the Parliament and other Organs of the AU; and a staff member of the AU

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<sup>427</sup> For example, the decisions of the EACJ and ECOWAS Court of Justice are final. See the discussions in part 2.2.3 and 2.2.4

on Appeal.<sup>428</sup> The Amendment Protocol includes the AU Peace and Security Council and the office of the Prosecutor of international crimes as some of the only other entities that may access the Court.<sup>429</sup> The Court is not open to states that are not members of the AU, nor to disputes involving non-members of the ACJ&HR Protocol.<sup>430</sup>

Albeit in a limited scope, and in matters regarding the Court's exercise of human rights and international crimes jurisdiction, African individuals<sup>431</sup> and African Non-Governmental Organisations accredited to the AU or its organs, may access the Court.<sup>432</sup> However, provision for direct access by individuals on trade and investment disputes is absent. To this end, the General Section of the Court, which is to exercise this jurisdiction, will only deal with inter-governmental disputes. The General Section of the Court may end up being moribund, given that African states do not have a culture of suing each other or perusing trade remedies in international courts or tribunals. Traders who engage in intra-African trade are usually not always state entities, while others may also be entities from non-AU states. The ACJ&HR, in its current frame, may not be useful in guaranteeing access to its trade and investment judicial remedies

The ACJ&HR Protocol does not address latent inconsistencies in its application of Article 29 of the Court's Statute as read with Article 3 (2) of the Amended Protocol. Article 3(2) of the Amendment Protocol expands the Court's jurisdiction to include appeals from decisions of judicial bodies of African RECs. Some African sub-regional RECs allow for direct access to their judicial organs by individuals, in trade and investment disputes, yet the ACJ&HR is clear that individuals cannot directly access the Court in matters other than international criminal law cases, presumably as complainants or victims seeking reparations. Should an appeal from a REC be brought to the

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<sup>428</sup>Article 29(1) of the ACJ&HR Protocol.

<sup>429</sup>Article 15 of the Amendment Protocol.

<sup>430</sup>Article 29 (2) of the ACJ&HR Protocol.

<sup>431</sup>Article 16 of the Amendment Protocol restricts the access to African individuals and African NGOs; a difficult term to define since many African states allow for dual citizenship. The NGOs must also have observer status with the AU or its Organs.

<sup>432</sup>Article 30 of the ACJ&HR Protocol.



ACJ&HR from a decision of an African REC by an investor, would that not give such individual access to the ACJ&HR contrary to the express intention of Article 29 of the Court's Statute?

Article 53 of the ACJ&HR also confers advisory jurisdiction on the Court. The opinions may cover legal questions at the request of the Assembly of Heads of State and Government; the AU Pan-African Parliament; the Executive Council; the Peace and Security Council; the Economic, Social and Cultural Council (ECOSOCC); the financial institutions, or any other organs of the AU as may be authorised by the Assembly.<sup>433</sup> It appears, therefore, that the Statute does not permit State Parties or RECs to seek advisory opinions from the Court.

### **3.3.2 The African Continental Free Trade Area (AfCFTA)**

The AEC Treaty envisages the establishment of a continental Free Trade Area in its third stage of integration.<sup>434</sup> This phase of the economic integration of the continent is to take place within ten years of the AEC Treaty.<sup>435</sup> The AfCFTA Agreement was launched on the 21<sup>st</sup> March 2018, in Kigali Rwanda. The Agreement has since been signed by 54 African States.<sup>436</sup> However, only 28 states have deposited their instruments of ratification.<sup>437</sup> It is the largest multilateral agreement after the WTO.<sup>438</sup> The Agreement came into force on 30<sup>th</sup> May 2019 on the 15<sup>th</sup> ratification as required by Article 23 of the AfCFTA Agreement.<sup>439</sup> Together with the Agreement, three other instruments were concluded in Kigali. The Protocol to the Abuja (AEC) Treaty relating to the Free Movement of Persons and the Right of Establishment; as well as the Kigali Declaration. A Protocol on Rules and Procedure on the Settlement of Dispute was also adopted.

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<sup>433</sup>Article 53(1) of the Statute of the ACJ&HR.

<sup>434</sup>Article 6(c) of the AEC Treaty.

<sup>435</sup>See the signature and ratification status of the AfCFTA at <<https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>> accessed on 19<sup>th</sup> September 2019.

<sup>436</sup>*ibid*.

<sup>437</sup>*ibid*, the Agreement came into force on 30<sup>th</sup> May 2019 after attaining the minimum 22 ratifications as required under Article 23 of the Agreement.

<sup>438</sup>D Luke, (n) 2 [2].

<sup>439</sup>*ibid*.

The key objectives of AfCFTA are spelt out in Article 3 of the Treaty. These, *inter alia*, include; creating a single market for goods and services facilitated by movement of persons so as to deepen the economic integration of the continent in accordance with the pan African Vision of “an integrated, prosperous and peaceful Africa” enshrined in the Agenda 2063. Significantly, the AfCFTA also aims at resolving the challenges of multiple and overlapping REC memberships, and to expedite the regional and continental integration processes.<sup>440</sup>

Article 4 of the AfCFTA Agreement sets out the specific objectives of the organisation to include the progressive elimination of tariffs and non-tariffs barriers to trade; cooperation in investment, intellectual property rights, competition policy, trade related areas, customs and implementation of trade facilitation measure; establishment of mechanism for the settlement of dispute concerning their rights and obligations; as well as establishing and maintaining an institutional framework for implementation and administration of the AfCFTA.

The AfCFTA is administered through four organs: The Assembly of Heads of State and Government of member states; the Council of Ministers, the Committee of Senior Trade Officials; and the Secretariat.<sup>441</sup> The Assembly sits at the apex of the AfCFTA’s organisational pyramid and gives policy endorsement to recommendations of the Council of Ministers.<sup>442</sup> The Council of Ministers is composed of trade Ministers of member states, and takes decisions on matters touching the AfCFTA Agreement.<sup>443</sup> The Committee of Senior Trade Officials consists of Permanent or Principal Secretaries of member states.<sup>444</sup> The Committee implements decisions of the Council of Ministers and develops programs and action plans for implementation under the agreement. The secretariat is hosted in Ghana and is charged with the day to day running of the AfCFTA.<sup>445</sup>

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<sup>440</sup>Article 4(h) of the AfCFTA Agreement.

<sup>441</sup>Article 9 of the AfCFTA Agreement.

<sup>442</sup>Article 10 of the AfCFTA Agreement.

<sup>443</sup>Article 11 of the AfCFTA Agreement.

<sup>444</sup>Article 12 AfCFTA Agreement.

<sup>445</sup>Article 13 the AfCFTA Agreement. The Choice of Ghana to host the Secretariat of the AfCFTA has both symbolic and sentimental significance. It is a befitting tribute to the pre- colonial and post-colonial pioneering Pan-Africanists led by Ghana’s first President, Kwame Nkrumah. It also underscores the AU’s commitment to its core values and principles, at least on paper, which Ghana exemplifies. These values include democracy, transparency, respect for

While some view the progression towards the AEC, beginning with the AfCFTA, as a milestone,<sup>446</sup> others see the stepwise approach to continental integration as “too cautiously and hesitantly” undertaken.<sup>447</sup> Fasan, for example, argues that the “variable geometry” principle enunciated in Article 5 of the AfCFTA Agreement introduces contradictions which are inimical to the single market objective.<sup>448</sup> He goes on to state that the variable geometry principle was designed to recognise the heterogeneity and diversity in Africa’s economies that form the single market.<sup>449</sup> However, this objective is not consistent with an *a la carte* approach, where members integrate at different speeds.<sup>450</sup> Ideally, he notes, every member should be subject to the same levels of obligation.<sup>451</sup> Furthermore, the variable geometry, which suggests a multi-speed integration, is not consistent with consensus in decision-making, another principle of the AfCFTA, as some states could hold back those willing to make faster progress.<sup>452</sup> He draws a useful comparison and notes that consensus in decision-making has been a major obstacle to the progress of negotiations at the WTO.<sup>453</sup>

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human rights, economic prosperity, free movement of persons and right of establishment; which values the AfCFTA underwrites. For a discussion on the significance of the choice of Ghana to host the AfCFTA Secretariat, see W Mutubwa, “Selection of Ghana to Host the AfCFTA Secretariat a Befitting Tribute to Kwame Nkrumah” (2019) Afronomicslaw.<[www.afronomicslaw.org/2019/08/2/selection-of-ghanato-host-the-AfCFTA-secretariat-a-befitting-tribute-to-kwame-Nkrumah](http://www.afronomicslaw.org/2019/08/2/selection-of-ghanato-host-the-AfCFTA-secretariat-a-befitting-tribute-to-kwame-Nkrumah)> accessed on 20<sup>th</sup> September 2019.

<sup>446</sup> For example, T Ngobeni T (2019) “The Relevance of the Draft Pan African Investment Code (PAIC) in Light of the Formation of the African Continental Free Trade Area” (2019) [2] <<http://www.afronomicslaw.org/2019/01/11/the-relevance-of-the-draft-pan-african-investment-code-paic-in-light-of-the-formation-of-the-african-continental-free-trade-area/>> accessed on 30<sup>th</sup> September 2019 [1]; D Luke, (n)2 [30].

<sup>447</sup>O Fasan, “Why AfCFTA may not be a credible Forerunner of Single African Market” (2019) [8] <<http://www.afronomicslaw.org/2019/02/06/why-afcfta-may-not-be-a-credible-forerunner-of-single-african-market/>> accessed on 30<sup>th</sup> September 2019.

<sup>448</sup> Ibid [9].

<sup>449</sup> Ibid.

<sup>450</sup> Ibid.

<sup>451</sup> Ibid.

<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

Ajibo summarises the problems confronting the AfCFTA continental economic integration as being four fold: fragmentation and divergences in trade norms and practices; sub-optimal performance of RECs; prevalence of lack of institutional capacity and transparency; and most importantly to this discourse, the defiance of rulings of sub-regional courts by REC member states.<sup>454</sup>

### ***3.3.2.1 Dispute Resolution under the AfCFTA.***

The Protocol on Rules and Procedures on the Settlement of Disputes, made under the AfCFTA, is the principal instrument that prescribes the methods of dealing with disputes under the Agreement.<sup>455</sup> The Protocol provides for a Dispute Settlement Body (DSB) as the principal organ of settlement of disputes.<sup>456</sup> Other amicable dispute settlement methods such as consultations, good offices, conciliation, mediation and arbitration are also prescribed as being useful before resort to the DSB.<sup>457</sup>

The DSB operates through panels with an approach which is borrowed from the WTO dispute settlement system.<sup>458</sup> According to Article 4 of the Agreement, the mechanisms adopted is

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<sup>454</sup> C Ajibo, “Regional Economic Communities as the building blocs of African Continental Free Trade Area Agreement: Challenges and Way Forward” (2019) [4-7]

<http://www.afronomicslaw.org/2019/02/04/regional-economic-communities-as-the-building-blocs-of-african-continental-free-trade-area-agreement-challenges-and-way-forward/> accessed on 30<sup>th</sup> September 2019. See also, generally, C Ajibo, “African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects” *Journal of World Trade* 53, no.5 (2019):871-894.

<sup>455</sup> The Protocol is concluded pursuant to Article 20, Part VI of the AfCFTA.

<sup>456</sup> Article 2 and 5 of the Protocol.

<sup>457</sup> Articles 6, 7, 8 and 27 of the Protocol.

<sup>458</sup> O Bose, “The Dispute Settlement Mechanism under the African Continental Free Trade Area” (2018) [1] <<https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html>> accessed on 20<sup>th</sup> November 2018. See also, generally, G Erasmus, “Dispute Settlement in the African Continental Free Trade Area” (2019) <<https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html>> accessed on 23<sup>rd</sup> September 2019. David Luke, the Coordinator of the African Trade Policy Centre (ATPC) at the UN Economic Commission for Africa (UNECA), confirms that the choice of the WTO approach in the AfCFTA inter-governmental trade governance system is deliberate and draws inspiration from the institutional arrangements for secretarial support and oversight at the WTO. Luke, (n) 2 [30].

a central element in providing security and predictability to the regional trading system. The mechanism is also involved in achieving satisfactory settlement of a dispute in accordance with right and obligations under the Agreement.

Article 20 of the AfCFTA Agreement establishes the DSB which is composed of representatives of states parties. The panels are established under Article 10 of the Protocol and their composition elaborated in the same Article. Each state party annually nominates individuals to serve on the panels. The panels sit on an ad hoc basis. Additionally, the panel members must be persons qualified in international law and international trade law, should be objective, reliable, of sound judgment, impartial, independent and should undertake to abide by the code of conduct developed by the DSB and adopted by Council of Ministers.<sup>459</sup> The panellists are to be selected with a view to ensuring sufficient diversity and a wide spectrum of experience in the subject matter of the dispute, unless the parties decide otherwise.<sup>460</sup>

The DSB only entertains disputes between states parties and disputes regarding the implementation and application of the AfCFTA Agreement.<sup>461</sup> However, third party rights can be taken into account during the panel process by ensuring submissions are received from and served upon them.<sup>462</sup> Third party rights also take into consideration decisions made with regard to their rights, entitlement and/or obligations.<sup>463</sup>

The DSB renders to the state parties involved its report and recommendations in accordance with Article 19 of the Protocol. An Appellate Body (AB), established under Article 20 of the Protocol, may hear and determine appeals from the first instance DSB panels. Final and binding recommendations of the DSB or its AB must be implemented by state parties.<sup>464</sup> The DSB panel or its AB may suggest ways in which the state party concerned could implement its

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<sup>459</sup>Article 10(3) of the Protocol.

<sup>460</sup>Article 10(4) of the Protocol.

<sup>461</sup>Article 3(1) of the Protocol.

<sup>462</sup>Article 3(1) of the Protocol.

<sup>463</sup>Article 13 of the Protocol.

<sup>464</sup>Article 24(1) of the Protocol.

recommendations.<sup>465</sup> The Protocol has established, under Article 24, a process of surveillance of implementation of recommendations and findings of the DSB Panels or the ABs. The DSB or the AB shall constitute a meeting to monitor its implementation thirty days after the adoption of recommendations or findings made by the DSB Panel.<sup>466</sup>

In the absence of voluntary compliance or in the event of non-compliance, the DSB panel or AB may recommend compensation, suspension of concessions or any other measures for purposes of enforcing its recommendations or rulings.<sup>467</sup> In doing so, the DSB or AB will take into account the importance of such trade that is to suffer nullification or impairment to the state party; and the economic effects or elements related to the nullification or impairment and the broader economic consequences of the recommendation.<sup>468</sup>

Just as in private dispute resolution, such as international commercial arbitration, the DSB determines the remuneration and expenses of the panellists, arbitrators and experts in accordance with the financial rules and regulations of the AU.<sup>469</sup> These are borne by the parties in proportions determined by the DSB.

The Protocol also provides for arbitration.<sup>470</sup> Its processes and enforcement of decisions of the arbitral tribunal, *mutatis mutandis*, follow those set out in the Protocol with regard to the DSB panels.<sup>471</sup>

The approach adopted by the Protocol is novel with respect to settlement of trade disputes in Africa, particularly in attempting the use of ADR mechanism as opposed to traditional adversarial methods such as tribunals and courts. The qualification of panellists to the DSB is also

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<sup>465</sup>Article 23 and 24 of the Protocol.

<sup>466</sup>Article 24(2) of the Protocol.

<sup>467</sup>Article 25 of the Protocol.

<sup>468</sup>Article 25(6) of the Protocol.

<sup>469</sup>Article 26 of the Protocol.

<sup>470</sup>Article 27 of the Protocol.

<sup>471</sup>Article 27(7) of the Protocol.

cognisant of the need for international/regional trade expertise. The monitoring of the implementation and enforcement mechanisms availed to the DSB and AB go further than traditional court dispute settlement where a court/tribunal is rendered *functus officio* upon rendering its decision.

### 3.4 Sub-Regional Economic Regionalism and Dispute Resolution in Africa

#### 3.4.1 The East African Community (EAC)

Before its disintegration and dissolution in 1977, the EAC was an effort of integration by supranational institutions of the three East African countries of Kenya, Uganda and Tanzania.<sup>472</sup> The three countries emerged from British colonialism in the 1960s. The colonial administration had established administrative organs such as the East African Railways and Harbours, the East African Airways, the East African Revenue Authority, an East African University and the East African Court of Appeal.<sup>473</sup> The organs and institutions were retained, and had a supranational authority over the three member countries, even after each of the three countries had gained independence and formed governments that exercised sovereign authority over their respective territories. The colonial EAHC was replaced in 1961 with the East African Common Services Organisation (EACSO).

The East African Community Treaty was signed on 6<sup>th</sup> June 1967 in Kampala, Uganda and inaugurated on 1<sup>st</sup> December 1967 in Arusha, Tanzania. The EAC inherited the organs of the EACSO.<sup>474</sup> In terms of dispute resolution, three important institutions existed: the Common Market Tribunal, the Court of Appeal of East Africa and the East Africa Industrial Court. These

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<sup>472</sup><<https://www.eac.int/eac-history>> accessed on 28<sup>th</sup> June 2018. See I Delupis, I *The East African Community and the Common Market* (Longman London 1970) 9-26.

<sup>473</sup>I Delupis, *ibid*, 31. These organs were administered under the East African High Commission (EAHC) established in 1948. Although it has been observed by Delupis that the EAHC was not an international Organisation in its strict sense because members were colonial entities. See also, J Bandfield, "The Structure and Administration of the East African Common Services Organisation" in C Leys and P Robson (eds), *Federation in East Africa: Opportunities and Problems* (Oxford University Press Oxford 1965) 30-40, 32.

<sup>474</sup>Article 3 of the Treaty for the East African Cooperation (1967) <https://www.eac.int/eac-history>, accessed 20<sup>th</sup> September 2018.

institutions exercised supranational judicial powers transcending the national boundaries of member states.<sup>475</sup> The EAC failed in 1977 primarily because of suspicion between the leaders of the three nations influenced by their differences and conflicting cold war era geo-political stand-points and persuasions.<sup>476</sup> A revival of the EAC founded on the 1999 EAC Treaty takes a significantly different integration approach from the defunct pre-1977 EAC.<sup>477</sup> The current EAC integration seeks to develop a political federation, but through a stepwise integration process which mostly takes an intergovernmental approach based on the linear progression model of integration.<sup>478</sup>

### **3.4.1.1 *The Structure and Organs of the EAC***

The EAC makes a distinction between its organs and institutions.<sup>479</sup> Its organs are the most important and include the Summit, the Council, the East African Legislative Assembly (EALA), and the EACJ.<sup>480</sup> The institutions encompass specialised bodies such as the East African Development bank, the Lake Victoria Fisheries Organisation and the Inter-University Council of East Africa.<sup>481</sup> The summit is the apex authority organ of the community and is composed of Heads of State or Government of the member states.<sup>482</sup> The Council comprises of ministers responsible for regional cooperation.<sup>483</sup> The secretariat is the executive organ of the community and is led by

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<sup>475</sup>A Springer, “Community Chronology” in R Fredland and C Potholm (eds), *Integration and Disintegration in East Africa* (University Press of America Lanham 1980) 3-36, 22.

<sup>476</sup>B Fagbayibo, (n) 32, 49. See also, C Mathieson, “The Political Economy of Regional Integration in Africa: the East African Community (EAC)” (2016) *European Centre for Development Policy Management*.

<sup>477</sup>T Ojienda, “The East African Court of Justice in the Re-established East African Community: Institutional Structure and Function in the Integration Process” (2005) *East African Journal of Peace & Human Rights*, 220-240, at 222.

<sup>478</sup> *ibid.* See also D Mazzeo, “The Experience of the East African Community: Implications for the Theory and Practice of Regional Cooperation in Africa” in Mazzeo D (ed.) *African Regional Organisations* (Cambridge University Press Cambridge 1984) 150-170.

<sup>479</sup> P van der Mei, “Regional Integration: The Contribution of the Court of Justice of the East African Community” (2009) 69 *ZaoRV* 69 403-425, 406.

<sup>480</sup> P Apiko, “Understanding the East African Court of Justice” (2017) *European Centre for Development Policy Management* 1-23, 3. The organs are spelt out in Article 9 of the EAC Treaty.

<sup>481</sup> Article 9 of the EAC Treaty.

<sup>482</sup> *ibid.*

<sup>483</sup> Articles 10-12 of the EAC Treaty.



a secretary general appointed by the summit.<sup>484</sup> EALA is the legislative organ of the EAC.<sup>485</sup> It is composed of 27 members and ex-officio members.<sup>486</sup> EALA members are appointed by member states and serve for a renewable term of 5 years.<sup>487</sup>

### **3.4.1.2 Jurisdiction of the EACJ**

Unlike its predecessor, the EACA, the EACJ does not engender supranational jurisdiction. Its jurisdiction is limited to the interpretation of the EAC Treaty and other instruments, to issue advisory opinions, arbitration, as well as employment and labour disputes that may arise between the EAC and its staff.<sup>488</sup> Perhaps the most instructive illustration of the Court's role in ensuring compliance with the treaty is seen in its decision in the case of *East African Law Society and Others v Attorney General of Kenya and Others*.<sup>489</sup> The court found that an amendment to the EAC Treaty, made with the exclusion of the civil society and the private sector, infringed on Article 150 of the Treaty.<sup>490</sup> The Court, however, curiously, declined to invalidate the amendments stating that the infringement was not a conscious one and was unlikely to recur.<sup>491</sup>

While the issue does not lie with the EACJ's jurisdiction in interpreting the EAC Treaty and regulating relationships between the Community's members and organs, it is not clear whether the Court exhibits the direct effect or supremacy principles of supranationalism. Article 33 of the Treaty provides that the decisions of the EACJ on the interpretation of the EAC Treaty have precedence over those of national courts on similar subject matter. Article 43 directs national courts and tribunals to refer a matter to the EACJ, if they consider that a ruling is necessary to enable the national court to give a judgement. This approach ensures harmony in the interpretation and application of the treaty by the partner states on the interpretation of the EAC Treaty.

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<sup>484</sup>ibid.

<sup>485</sup>Articles 66-73 of the EAC Treaty.

<sup>486</sup>Articles 48-65 of the EAC Treaty.

<sup>487</sup>Article 50 of the EAC Treaty.

<sup>488</sup>Articles 23, 36, 31 and 32 of the EAC Treaty.

<sup>489</sup>EAC (2008). <<http://eacj.eac.int/?cases=east-africa-law-society-and-4-others-vs-attorney-general-of-kenya-and-3-others>>.accessed on 15<sup>th</sup> September 2018.

<sup>490</sup>ibid, 30-31.

<sup>491</sup>ibid, 43-44.

Article 30 of the EAC Treaty permits the EACJ to admit cases brought by legal and natural persons who are resident in the partner states. Individuals can therefore challenge the legality of an act, regulation, directive, decision or act of a Partner State, or an institution of the Community on the grounds of its unlawfulness, or infraction of the treaty. Unlike other similar treaties, the EAC Treaty is silent on the requirement for a person to exhaust local remedies before moving the Court. The doctrine of subsidiarity is therefore not applicable, rendering the EACJ accessible as a court of first instance. To this extent, the doctrines of direct effect and access are underscored by the Treaty.

Three decisions of the EACJ are useful in placing this discussion into context. In the case of *Anyang' Nyong'o v Attorney General of Kenya*<sup>492</sup>, which involved the election of members of the EALA representing Kenya, the applicant contended that Kenya's representatives had been nominated in violation of Article 50 of the EAC Treaty.<sup>493</sup> The Court held that a country cannot invoke its domestic laws as a justification for failure to meet its treaty obligations. This decision seems to suggest an inclination of the court towards an interpretation that favours supremacy of the EAC laws over national laws of member states.

However, a subsequent decision of the same court seems to take an entirely different trajectory in respect of the supremacy principle. In its decision in the case of *East African Civil Society Organization Forum v The Attorney General of the Republic of Burundi & 2 others*<sup>494</sup>, the Court held that it lacked the requisite jurisdiction to interfere with decisions of constitutional courts of member states or to sit on appeal on decisions of such courts.

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<sup>492</sup><<http://eacj.eac.int/?cases=prof-peter-anyang-nyongo-and-others-vs-attorney-general-of-kenya-and-others.>>

accessed on 9<sup>th</sup> September 2018.

<sup>493</sup>Article 50 stipulates that “*The National Assembly of each partner state shall elect ...nine members of the Assembly, who shall represent as much as is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State shall determine.*”.

<sup>494</sup><<http://eacj.eac.int/?cases=application-no-5-of-2015-arising-from-reference-no-2-of-2015-east-african-civil-society-organisations-forum-eacsof-vs-attorney-general-of-burundi-2-others.>> accessed on 9<sup>th</sup> September 2018.

Articles 33 and 34 of the EAC Treaty are clear that the EACJ is not an appellate court from member state courts. The Court's decision in the *East African Civil Aviation case* also seems to clarify this position. However, in its decision in the case of *Sitenda Sebalu v Secretary General of EAC and Attorney General of the Republic of Uganda*<sup>495</sup>, the EACJ *seems to* suggest that an appeal from national courts could be entertained by the Court. In the said case, the Applicant had brought the case as an appeal from the decision of the Supreme Court of Uganda. He averred that the continuous delay in establishing the East African Court of Appeal as stipulated by Article 27 of the Treaty is a blatant violation of the rule of law and the Treaty. The Court agreed with the Applicant and directed a quick operationalisation of the relevant Protocol. The Council of Ministers instead amended the draft Protocol to exclude the appellate and human rights jurisdiction to the EACJ as had been proposed.

### 3.4.2 The Southern African Development Community (SADC)

SADC was first created in 1980 as the Southern African Development Coordinating Conference (SADCC).<sup>496</sup> Its underlying principal objective was to reduce its members' dependence on the then apartheid South Africa.<sup>497</sup> In anticipation of the democratisation of South Africa, SADCC transformed into SADC in 1992 and South Africa joined it in 1994. SADC's predecessor SADCC was not a market integration arrangement in its strict sense but one whose members, known as front line states,<sup>498</sup> adopted a broad development mandate. SADCC, therefore, engaged in cross-border sector specific projects in infrastructure and energy such as the regional development corridors and the Southern African Power pool.<sup>499</sup>

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<sup>495</sup> <http://eacj.eac.int/?cases=honorable-sitenda-sebalu-vs-secretary-general-of-the-eac-attorney-general-of-the-republic-of-uganda-honorable-sam-k-njuba-and-the-electoral-commission-of-uganda>. Accessed on 9<sup>th</sup> September 2018.

<sup>496</sup> <https://www.sadc.int/about-sadc/overview/history-and-treaty/>. Accessed on 12<sup>th</sup> September 2018.

<sup>497</sup> T Hartzenberg, "Regional Integration in Africa, Trade and Centre for Southern Africa (Tralac) WTO Manuscript." (October 2011) *Staff Working Paper ERSD 2011-14, SADC Treaty* <[www.wto.int/files/9113/5292/9434/SADC\\_Treaty.pdf](http://www.wto.int/files/9113/5292/9434/SADC_Treaty.pdf)> accessed on 4<sup>th</sup> July 2018, 5.

<sup>498</sup> Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>499</sup> T Hartzenberg, (n) 497.

The SADC Treaty (and subsequently the SADC trade protocol) does not elaborate on a detailed integration plan, but such detail is to be found articulated in the Regional Indicative Strategic Development Plan (RISDP) of 2003.<sup>500</sup> The RISDP sets out to embark on a roadmap of SADC from a FTA by 2008, to a Customs Union in 2010, a Common Market in 2015, a Monetary Union in 2016 and the introduction of a single currency in 2018.<sup>501</sup> Though not a legally binding instrument, the RISDP bears significant political legitimacy and is recognised as a blueprint towards the integration of SADC member states.

The SADC approach has been likened to that of the EAC.<sup>502</sup> Both are based on the linear market progression paradigm, with the only striking difference being that the EAC envisages a political federation, while the integration of SADC only ends at economic integration with a monetary union.<sup>503</sup> SADC prides itself as having achieved 85% of intra- regional trade amongst its members in a phased programme achieved in 2008.<sup>504</sup> However, the set minimum tariff liberalisation was achieved in 2012, later than the targeted 2008 date.<sup>505</sup> Most member states still lag behind and as a result the strategic plan to achieve a Customs Union, with common external tariffs by 2010; a Common Market with common policies and production regulation by 2015; a macroeconomic convergence; and a monetary union by 2016 have not been met.<sup>506</sup> Additionally, the envisaged monetary union, first set to be achieved in 2016 has not been achieved and was therefore postponed to the year 2018.<sup>507</sup> What is more, the fundamental key pillars for the establishment of a monetary union and adoption of a single currency, such as the establishment of a SADC central bank, are still lacking.<sup>508</sup>

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<sup>500</sup>ibid.

<sup>501</sup>ibid.

<sup>502</sup>ibid, 6.

<sup>503</sup>T Hartzenberg, (n) 497, 5.

<sup>504</sup> ibid.

<sup>505</sup> SADC <<https://www.sadc.int/about-sadc/integration-milestones/>> accessed on 2<sup>nd</sup> September 2018.

<sup>506</sup> K Padamja, "COMESA and SADC: Prospects and Challenges for Regional Trade Integration" (2004) *IMF Working Papers* WP/04/227, 12-13. <<https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Comesa-and-Sadc-Prospects-and-Challenges-for-Regional-Trade-Integration-17852>> accessed on 9<sup>th</sup> September 2018.

<sup>507</sup>SADC Treaty, 13.

<sup>508</sup> ibid.

### **3.4.2.1 Structure and Organs of SADC**

Article 9 of the SADC Treaty creates the organs of Community. The organs include: the Summit of Heads of State and Government of the Member States<sup>509</sup>; the Organ on Politics, Defence and Security Operations<sup>510</sup>; the Council of Ministers<sup>511</sup>; the Sectoral Ministerial Committees<sup>512</sup>; the Standing Committee of Officials;<sup>513</sup> the Secretariat<sup>514</sup>; the Tribunal<sup>515</sup>; and the SADC National Committees.<sup>516</sup>

### **3.4.2.2 The SADC Tribunal**

Article 16 of the 2000 SADC Treaty establishes that the SADC Tribunal's role is to interpret the Treaty and its subsidiary instruments, as well as to adjudicate upon referred disputes. It can also give advisory opinions to the Summit of Heads of State and Government and Council of Ministers, if called upon. The SADC Tribunal was disbanded in 2012 after being suspended and staying moribund since 2010.<sup>517</sup> Following a decision of the Summit of Heads of State and Government

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<sup>509</sup> Article 10, SADC Treaty.

<sup>510</sup> Comprising of Ministers of state parties for foreign affairs, public service, defence, state security or police. Article 10 A.

<sup>511</sup> Consisting of one Minister from each member state, preferably a Minister in charge of Foreign Affairs. Article 11.

<sup>512</sup> In line with the various sectoral mandates of the Community such as, trade and Industry, finance and investment, infrastructure, education, labour, legal and judicial Affairs. Article 12.

<sup>513</sup> Each sectoral Committee shall consist of one Permanent Secretary or an Official of equivalent rank from each m, from the Ministry that is the SADC National Contact Point. Article 13, SADC Treaty.

<sup>514</sup> Led by the Executive General. Article 14, SADC Treaty.

<sup>515</sup> Article 1, SADC Treaty.

<sup>516</sup> Created in each member state constituting key stakeholders to the implementation of SADC's programmes. Article 16A, SADC Treaty.

<sup>517</sup> The Summit of Heads of State refused to appoint new judges or to renew the appointments of those serving. See, G Erasmus, "The New Protocol for the SADC Tribunal: Jurisdictional Challenges and Implications for SADC Community Law" (2015) <<https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html>> accessed on 2<sup>nd</sup> September 2019, 1. The new SADC Tribunal Protocol is available at <<https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf>>. See the amendment Protocol at

held in 2014, a new SADC Tribunal Protocol was signed but has not received the requisite of 10 ratifications for it to come into force.<sup>518</sup> It is also important to highlight that it may take years to comply with the ratification processes under the new protocol, which involves compliance with the domestic laws of member states.<sup>519</sup>

### **3.4.2.3 Jurisdiction of the SADC Tribunal**

Under the new protocol, the tribunal's jurisdiction was curtailed to specifically deal with disputes between state members.<sup>520</sup> Its necessity and continued existence is cast in doubt, particularly since member states do not ordinarily sue each other.

The watering down of the mandate of the tribunal and its eventual disbandment by the bloc's summit of heads of states was seen as an attempt to appease Zimbabwe. Zimbabwe had threatened to withdraw from the Protocol establishing the tribunal following the adverse decisions and orders by the Tribunal against it in *the Michael Campbell v Zimbabwe case*.<sup>521</sup>

Neither the SADC Treaty nor the two SADC Tribunal Protocols expressly provide for the direct effect of SADC laws over member states or supremacy of the tribunal's decisions over national courts. The direct effect of the Treaty's provisions or the Tribunal's decisions over Member states is also absent. Additionally, the Treaty and the 2000 Protocol on the Tribunal denied individuals the direct access to the court. However, the Tribunal, creatively, admitted and adjudicated claims, made by natural and juristic persons, invoking the implied power doctrine.<sup>522</sup> To this end, the *Mike Campbell case* is instructive.

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[https://www.sadc.int/files/3515/6525/8317/Agreement\\_Amending\\_the\\_Protocol\\_on\\_the\\_Tribunal\\_-\\_2007\\_-\\_English.pdf](https://www.sadc.int/files/3515/6525/8317/Agreement_Amending_the_Protocol_on_the_Tribunal_-_2007_-_English.pdf) accessed on 2<sup>nd</sup> September 2019.

<sup>518</sup> Article 53 of the 2014 SADC Tribunal Protocol.

<sup>519</sup> G Erasmus, (n) 517, 1.

<sup>520</sup> Article 33.

<sup>521</sup> [2008] SADCT 2 (28 November 2008) SADC Tribunal (SADC). See also, L Ndlovu, "Following the NAFTA star: SADC Land Reforms and Investment Protection after the Campbell Litigation" (2011) 15 *Law Democracy and Development* 1-30.

<sup>522</sup> The principle of *Implied Powers* essentially means that in the absence of express powers in the constitutive instrument establishing a tribunal, that tribunal can resort to implied powers to establish the jurisdiction necessary for

In the *Mike Campbell* case, the SADC Tribunal had awarded the Applicant, a company whose majority shareholding was owned by a South African citizen, against the government of Zimbabwe. The Applicant subsequently moved to the Zimbabwean High Court to enforce the Tribunal's decision, which was rejected. The Zimbabwean High Court went on to disallow Mr Campbell's prayers on the grounds that the land reforms, upon which he lay his claim, formed part of public policy and was therefore for public good. The applicant had brought an action against the government of Zimbabwe subsequent to forceful land eviction in the aftermath of seizure of its land through a state sanctioned policy allowing independence war veterans to do so. The Zimbabwean government first resisted the jurisdiction of the SADC tribunal over the matter, and upon failure on this ground absconded appearing before the tribunal. The Zimbabwean government was found by the SADC Tribunal to be in contempt of the Tribunal's orders and in multiple breach of the SADC Treaty. The applicant, thereafter, successfully sought to enforce the decision of the

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the fulfilment of its mandate. On the other hand, the doctrine of *Express Powers* denotes that international tribunals derive their powers from the respective treaties adopted by member states. These treaties give them express powers. There is always tension between the two doctrines with scholarly support for each in equal measure. Those who are conservative subscribe to the *Express Power* approach, while the implied Powers is attractive to those liberally inclined. For example, Crawford asserts that the Implied Power principle can be applied by international tribunals while Nkatha advances that an attempt by an Organisation to impose new obligations that are not the in the founding instrument on Member States, would be an act *ultra vires*, beyond the powers originally given to the institution by the treaty. For a definition of the concepts and their application by international tribunals see, J Crawford, "Brownlie's Principles of Public International Law" (2012) 12<sup>th</sup> ed, 651. For the application of the concept in judicial decisions ; see, *Katabazi and 21 Others v Secretary General of the East African Community and Another* (Ref. No1 of 2007) (2007) EACJ 3 (1 November 2007); LN Murungi and Gallinetti "The Role of sub-Regional Courts in the African Human Rights System" 2010 (7) *International Journal on Human Rights law Journal* 119-143, 119; MJ Nkatha (2012) "The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflections on the Human Rights Mandate of the Southern Africa Development Community" (2012) 20 *African Journal of International and Comparative Law* 97. For a detailed analysis of the jurisdiction of the EACJ, see W Mutubwa "Martha Karua v. Republic of Kenya: A litmus test for East African Court of Justice's ever shifting Supremacy and Jurisdictional Remit" 2019 available at <https://www.afronomicslaw.org/2019/11/08/martha-karua-v-republic-of-kenya-a-litmus-test-for-east-african-court-of-justices-ever-shifting-supremacy-and-jurisdictional-remit/> accessed on 19<sup>th</sup> November 2019.

tribunal through diplomatic protection in South Africa and subsequently moved to attach the assets of Zimbabwe in South Africa.<sup>523</sup>

Both the South African Supreme Court of Appeal and the Constitutional Court rejected Zimbabwe's appeals after the South African High Court at Pretoria had allowed for the seizure of Zimbabwe's assets. Zimbabwe, through its Justice Minister then wrote purporting to withdraw from the SADC Tribunal Protocol. In May 2011, in an extraordinary Summit of Heads of State and Government of SADC held in Namibia, declined to re-appoint or replace all the SADC Tribunal members rendering it non-functional. That decision by the SADC summit of Heads of State and Government came under sharp criticism as it undermined not only the SADC Tribunal's authority as an institution but also SADC as a REC.<sup>524</sup> SADC's credentials as a REC governed by the rule of law and its members' commitment to that ideal were seriously cast in doubt.

The *Mike Campbell* case is celebrated for two memorable firsts.<sup>525</sup> Firstly, it is celebrated as the first case in which assets/property of a state were seized in compensation for human rights violations committed by a member state. Secondly, the decision is marked as significant because of the SADC Tribunal's ability to flex its muscles on its independence. The South African Courts' resilience in the face of internal and external political pressure in upholding human rights, judicial independence and finality of the decision of the SADC tribunal, are also laudable.

The *Mike Campbell* case also brought into sharp focus the judicial supremacy contest pitting regional courts/tribunals, on the one hand and national courts, on the other. Additionally,

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<sup>523</sup>Diplomatic Protection is a principle developed in international law which allows one to invoke the diplomat assistance of one's state against another to enforce rights recognised in international law.

<sup>524</sup> D Zongwe, "The Contribution of *Campbell v Zimbabwe* to the Foreign Investment on Expropriations" (2009) 5(9) *Osgoode Hall Law School CLP Research Paper*, available at <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1158&context=clpe> accessed on 19<sup>th</sup> November 2019. See also, PN Ndlovu, "Campbell v Republic of Zimbabwe: A Moment of Truth for the SADC Tribunal" (2011) 1 *SADC Law Journal*. Both SADC Lawyers' Association and the International Commission of Jurists (ICJ) Africa office and the Pan African Lawyers Union (PALU) roundly criticized the suspension of the SADC tribunal and sought the intervention of the African Court on Human and Peoples' Rights.

<sup>525</sup>*ibid.*



the case also demonstrated the lack of independence of REC organs over the overbearing summit of Heads of State and Government and by implication, the deficiency of the rule of law in the management of affairs of RECs in Africa.

Praise for the SADC Tribunal, like the EACJ discussed above, for rising to the occasion and striking a blow for judicial independence have not been few.<sup>526</sup> Both EACJ and the SADC Tribunal have demonstrated their ability to underscore their independence from national influences and regional politics. However, by the very architecture of these institutions, the control of judicial organs by the executive arm of the RECs (namely the summit of Heads of State and Council of Ministers), exercised through the appointment mechanisms, funding and enforcement of their decisions, has seen the continued recurrence of these unfortunate drawbacks. These include the suspension or dissolution of strong judicial organs always being a lingering possibility.

Not many African national judicial organs and courts have the ability or wherewithal to be as independent of political pressure and machinations as was demonstrated by South African courts in the *Mike Campbell case*. Prospects of revival of the court in its original form remain dim. Fabricius (2019) notes that South Africa, the largest and most influential country in the SADC region and its leadership, as currently constituted, lack the wherewithal to push for revival of the SADC tribunal in its previous form.<sup>527</sup>

### **3.4.3 The Common Market for Eastern and Southern Africa (COMESA)**

The COMESA was first established as a Preferential Trade Area with members not only adopting and ratifying the PTA agreement but also domesticating it.<sup>528</sup> The PTA transformed into the COMESA

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<sup>526</sup> See PJ Ngandwe, “The Predicament of African Regional Courts: lessons from the Southern African Development Community Tribunal” 2012 (1) *The Pan African Yearbook of Law* 47-66; L Nathan, “The Disbanding of the SADC Tribunal: A Cautionary Tale” 2013 (35) *Human Rights Quarterly* 870-892.

<sup>527</sup> P Fabricius, “Will South Africa Fight for the SADC Tribunal’s Revival” (2019) *ISS Today* <<https://issafrica.org/iss-today/will-south-africa-fight-for-the-sadc-tribunals-revival>> accessed on 20<sup>th</sup> September 2019.

<sup>528</sup> For example, the Preferential Trade Area (implementation) Act Cap 4B, Act no.7 of 1991 of the Laws of Kenya domesticates the 1981 Preferential Trade Area for Eastern and Southern African States Treaty, 1981.

following for the adoption of the COMESA Treaty in the year 1994.<sup>529</sup> The COMESA Member States have since concluded protocols on Rules of Origin (2015), Free Movement of Persons, Labour, Services, Rights of establishment and Residence (1998), Investment Agreement for COMESA Common Investment Area (2007), the Common Market and Customs Union Regulations (2009, 2011).<sup>530</sup> Regulation of trade in services competition and merger Assessment guidelines (2004 and 2014) have also been concluded.<sup>531</sup>

### **3.4.3.1 Structure and Organs of the COMESA**

The organs of the Common Market include: the Authority<sup>532</sup>; the Council<sup>533</sup>; the Court of Justice<sup>534</sup>; the Committee of Governors of Central Banks of Member States; the Intergovernmental Committee<sup>535</sup>; the technical Committees<sup>536</sup>; the Secretariat<sup>537</sup>; and the Consultative Committee.<sup>538</sup>

### **3.4.3.2 The COMESA Court of Justice**

The COMESA Court of Justice (CCJ) is established by Article 7 of the COMESA Treaty.<sup>539</sup> Article 19 provides that the Court's mandate is to ensure adherence to law in the interpretation and application of the Treaty. The Court has a first instance and appellate division.<sup>540</sup> In addition, the Court has twelve Judges appointed by the Authority from persons proposed by member states in accordance with Article 20 of the Treaty. The general jurisdiction of the Court is defined, in Article 23 of the Treaty, as “to

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<sup>529</sup> COMESA <<https://www.comesa.int/company-overview-2/>> accessed on 28<sup>th</sup> June 2018.

<sup>530</sup> *ibid.*

<sup>531</sup> *ibid.*

<sup>532</sup> Consisting of Heads of State or Government of the Member States. Article 8.

<sup>533</sup> Ministers designated by Member States. Article 9.

<sup>534</sup> Article 19.

<sup>535</sup> Consisting of permanent and Principle secretaries designated by Member State. Article 14.

<sup>536</sup> On various thematic areas such as Budget, Agriculture, Energy and Finance Article 15.

<sup>537</sup> Led by a Secretary-General. Article 17.

<sup>538</sup> Made up of members of the business community and other interest groups. Article 18.

<sup>539</sup> For a summary of the institutional organisation and jurisdiction of the COMESA Court of Justice, see K Mwendwa, “Court of Justice of the Common Market for Eastern and Southern Africa (COMESA)” (2009) 6 *Miskolc Journal of International Law* 60 -83, at 60-64.

<sup>540</sup> *ibid.*

adjudicate all matters which may be referred to it pursuant to this Treaty”. This definition of the Court’s remit is not helpful and seems vague, unless read in light of Article 19 of the Treaty.

The Court may admit claims from member states, the Secretary-General, and legal and natural persons.<sup>541</sup> Furthermore, the court also has jurisdiction to hear and determine treaty and special agreements arbitration to which the Common Market, its institutions, or member States, are parties and refer the same to the Court.<sup>542</sup> However, the Court’s jurisdiction is not exclusive, meaning that national courts are not excluded from hearing and determining disputes for the reason only that the Common Market is a party.<sup>543</sup> Therefore, decisions of the Court on interpretation of provisions of the Treaty have precedence over decisions of national courts.<sup>544</sup>

Article 26 of the COMESA Treaty gives access to juridical and natural persons to the CCJ. This is however limited to residents of the member states and limited to matters regarding the determination of the legality of an act, regulation, directive, or decision of the Council or of a Member State. Direct access to the court is available but only to the extent that an applicant invites the Court to either interpret, apply or find an infringement of the Treaty by a State Party or the Common Market Organs.<sup>545</sup>

In its decision in the case of *Malawi Mobile Ltd v Government of Malawi and the Malawi Communications Regulatory Authority*<sup>546</sup>; the CCJ clarified its basic jurisdictional remit. Firstly, that the Court cannot be considered as a general supranational court with an obligation to control the legality

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<sup>541</sup>Article 25 and 26.

<sup>542</sup>Article 29.

<sup>543</sup>Article 28(1).

<sup>544</sup>Article 28(2).

<sup>545</sup>Article 26.

<sup>546</sup>Appeal number 1 of 2016 <<https://www.comesacourt.org/wp-content/uploads/2017/04/Government-of-Republic-of-Malawi-Vs-Malawi-Mobile-Limited-Judgment-Appeal-no-1-of-2016-Part-1.pdf>> For an overview of the import of the case on access to the court by individuals, see, generally, D van Wyk, “An Important COMESA Court Qualifier for Natural and Legal Persons approaching the Court” (2019) Available at <<https://www.tralac.org/blog/article/14153-an-important-comesa-court-qualifier-for-natural-and-legal-persons-approaching-the-court.html>>. Accessed on 23<sup>rd</sup> September 2019.

of every national legal act unrelated to the Treaty.<sup>547</sup> Secondly, the Court emphasised that its authority to grant access to juridical and natural persons stems from Article 26 of the COMESA Treaty and that the said provision limited such access to matters relating to the Treaty.<sup>548</sup> The Court, therefore, found that its decisions only overrode those of national courts on matters of interpretation and application of the Treaty and no further.<sup>549</sup> This means that the CCJ has supremacy over member national courts only in the interpretation and application of the treaty. Judgements of the CCJ are “final and conclusive” and member states are required to take measures “without delay” to implement the judgements.<sup>550</sup>

In order to exercise its jurisdiction over matters submitted to it by individuals residing in the COMESA member states, such individuals must first exhaust local remedies in the national courts or tribunals of the member state.<sup>551</sup> The CCJ can also entertain requests for preliminary rulings on the validity of the regulations, directives, and decisions of the Common Market from national courts of member states and issue advisory opinions regarding questions of law arising from provisions of the COMESA Treaty.<sup>552</sup>

The COMESA Treaty has created a hybrid mechanism for dispute resolution. It has created a supranational judicial organ capable of resolving all trade and investment disputes involving the Common Market, while at the same time permitting the resolution of disputes arising under the

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<sup>547</sup>ibid, 11.

<sup>548</sup>ibid, 13.

<sup>549</sup> See also, the Court’s decision in *Polytol Paints & Adhesives Manufacturer Co. Ltd v The Republic of Mauritius*, Case No.1 of 2012 COMESA CJ (31<sup>st</sup> August 2013) <<https://comesacourt.org/wp-content/uploads/2017/04/Judgment-Polytol-Paints-Adhesives-Manufacturer-Co.ltd-Vs-the-Republic-of-Mauritius-%E2%80%93-Reference-No.-1-of-2012-Part-1.pdf>> accessed 20<sup>th</sup> September 2018.

<sup>550</sup> Articles 31 and 32 of the CCJA.

<sup>551</sup> Article 26 of the COMESA Treaty. See also, P Muchlinski, P (2010) “The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement” SOAS School of Law Legal Studies Research Paper Series” (2010) *Research Paper No. 11/2010* <<https://www.cambridge.org/core/books/alternative-visions-of-the-international-law-on-foreign-investment/comesa-common-investment-area-substantive-standards-and-procedural-problems-in-dispute-settlement/3B5B73701E5033C58DF2629BBCE2FA56>> accessed on 15<sup>th</sup> November 21, 2018.

<sup>552</sup> Articles 30 and 32 of the COMESA Treaty.

COMESA Investment Agreement through ad hoc investor-state arbitration.<sup>553</sup> The ad hoc investor-state dispute resolution mechanism in the COMESA Investment Agreement is modelled, in substantial part, on the analogous mechanism in the 2004 U.S Model Bilateral Investment Treaty (2004 U.S. Model BIT).<sup>554</sup> The approach incorporates many of the innovative procedural aspects of the 2004 Model U.S BIT, including its mechanism for expeditious consideration of preliminary objections and rules admission of amicus curiae submissions.<sup>555</sup>

#### **3.4.4 The Tripartite Free Trade Area (TFTA) Agreement**

The Agreement establishing the TFTA agreement was concluded on 10<sup>th</sup> June 2015.<sup>556</sup> The agreement followed years of engagement between Member States negotiating the TFTA agreement. A tripartite summit of Heads of State and Government representing the three merging RECs held on 22 October 2008 agreed, inter alia, to establish a single Customs Union, beginning with a Free Trade Area.<sup>557</sup> A tripartite memorandum of understanding was signed on 19<sup>th</sup> January 2011.<sup>558</sup> This was soon to be followed by the declaration launching the negotiations for the establishment of the Tripartite Free Trade Area in Johannesburg, South Africa, on 12<sup>th</sup> June 2011.<sup>559</sup>

In fairly similar terms to the Constitutive Act of the AU, the TFTA Agreement acknowledges the place and role of RECs as building blocks for trade liberalisation in Africa.<sup>560</sup> Like the AEC Treaty, the Agreement also expressly recognises the successes and best practices of

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<sup>553</sup> C Goretti, *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff Publishers Boston 2011) 497.

<sup>554</sup> *ibid.* The 2004 US Model BIT has since been replaced by a 2012 version.

<sup>555</sup> Annex A, Articles 7 and 8 of the COMESA Investment Agreement <<https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf>> accessed on 15<sup>th</sup> November 2018.

<sup>556</sup> Preamble to TFTA Treaty. A full text of the agreement and the declarations are available at <<https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html>>

<sup>557</sup> *ibid.*

<sup>558</sup> *ibid.*

<sup>559</sup> *ibid.*

<sup>560</sup> *ibid.*, 3.

RECs as important lessons from which it can draw on its march towards trade liberalisation under the TFTA Agreement framework.<sup>561</sup>

The objectives of the TFTA can be gleaned from the founding Agreement. They fundamentally include, among others, a commitment to resolving the challenge of overlapping membership of the tripartite member/partner states to several RECs, job creation and income generation for the people of the member states, progressive liberalisation of trade in goods and service, deepening integration among member states and by progressively achieving elimination of import duties and other barriers to trade within the bloc.<sup>562</sup>

The TFTA Agreement proceeds from the principle that member states shall accord each other the Most Favoured Nation Treatment. However, it qualifies the same by providing that nothing in the Agreement shall prevent a member state from maintaining or entering into new preferential trade agreements with third countries, provided that any advantages, concessions, privileges or favours granted to a third country under such agreements are offered to the other members of the TFTA on a preferential basis.<sup>563</sup> Preferential agreements between member states of the TFTA are also not prohibited. However, other members of the TFTA, not parties to such preferential agreement, shall on a reciprocal basis, be accorded benefit of privileges under such an Agreement despite not being party thereto.<sup>564</sup>

In furtherance of its harmonisation of import duties and in a bid to eliminate trade barriers, the TFTA members also agreed to design and standardise their trade and customs documentation and information in accordance with internationally accepted standards and to initiate trade facilitation programmes.<sup>565</sup>

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<sup>561</sup> Article 4 and 5 TFTA Treaty, *ibid*, 6.

<sup>562</sup>*ibid*.

<sup>563</sup>Article 7 TFTA Agreement, 6.

<sup>564</sup>*ibid*.

<sup>565</sup>*ibid*.

#### **3.4.4.1 *Structure and Organs of the TFTA***

The organs for the implementation of the TFTA Agreement include the tripartite summit of Heads of State and/or Government, which sits at the pinnacle of its organisational superstructure. Below this are the Council of Ministers, Sectorial Ministerial Committees, and a Task Force of the secretariats of the RECs, which gives policy guidance to the TFTA. A Tripartite Committee of Experts enjoined to be responsible for overseeing and to guide its technical work, is also established.<sup>566</sup>

The Tripartite Agreement retains the structures of the merging RECs and hopes to build upon their successes, experiences and structures before progressively incorporating them into its own systems. The seamless transition, therefore, heavily borrows and relies, at least at the technical implementation level, on the COMESA, EAC and SADC structures.

#### **3.4.4.2 *The TFTA Dispute Settlement Body***

A Dispute Settlement Body is also created to administer the rules and procedures as well as settle disputes under the Agreement.<sup>567</sup> The DSB shall operate through panels and appellate bodies. The Body shall go further to maintain surveillance of implementation of rulings and recommendations of panels and its appellate bodies. Moreover, the DSB's jurisdiction can only be invoked as a residual mechanism in the event of failure of good faith consultations and negotiations entered into with a view to amicably settling a dispute.<sup>568</sup>

Neither the principles of direct effect nor supremacy of both the TFTA laws nor decisions of its Dispute Resolution Body, over national laws and judicial organs, have been provided for in the TFTA Agreement. In fact, the TFTA is largely an intergovernmental/inter- REC body with all its attributes, including access to its dispute resolution body, being available only to member states or the merging RECs.<sup>569</sup>

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<sup>566</sup>Article 29 of the TFTA Agreement, 4.

<sup>567</sup>Article 30 of the TFTA Agreement, 15.

<sup>568</sup>*ibid.*

<sup>569</sup>Article 30(3) of the TFTA Agreement.

Significantly, the TFTA Agreement is categorical that in the event of inconsistency or conflict, between the Agreement, the treaties and the instruments of COMESA, EAC and SADC, with respect to dispute resolution, the TFTA agreement shall prevail to the extent of the inconsistency or conflict.<sup>570</sup> However, the TFTA Agreement does not take a similar position with respect to inconsistencies or conflicts between it and the AU Constitutive Act or the AfCFTA established by the AEC Treaty dispute settlement organs.

### **3.4.5 The Economic Community of West African States (ECOWAS)**

Thompson observes that the mid-nineteenth century nationalist struggle in West Africa intertwined with the emergence of pan-Africanist integration largely led to the birth of the ECOWAS.<sup>571</sup> Regional cooperation saw the creation of federal arrangements or establishment of common institutions such as a Court of Appeal and University in the sub-region.<sup>572</sup> However, it was not until 1972 that the efforts to transform the sub-region into an institutional organisation eventually came to materialise. This was first through a bilateral agreement between neighbouring Togo and Nigeria. ECOWAS was formed in 1975 in Lagos, Nigeria by 15 founding state parties. Article 2 of the 1975 ECOWAS Treaty provided for its objectives, which were largely economic, to include: the elimination of duties, the free movement of persons, capital, services, as well as the harmonisation of agricultural and industrial policies.

Realising that a new political and economic world order had set upon them, the Member States of ECOWAS established, in May 1990, a Committee of Eminent Persons to review the 1975 Treaty.<sup>573</sup> A key recommendation of the Committee was to place more emphasis on supranationalism in the ECOWAS integration effort with stronger organs vested with more

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<sup>570</sup> *ibid.*

<sup>571</sup> V Thompson, *Africa and Unity: The Evolution of Pan-Africanism* (Longman London 1969) 28.

<sup>572</sup> *ibid.*

<sup>573</sup> The ECOWAS Revised Treaty signed in 1993 <<https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>> accessed on 9<sup>th</sup> September 2018.



power.<sup>574</sup> The committee's recommendations formed the basis of the revised 1993 ECOWAS Treaty.<sup>575</sup>

### **3.4.5.1 *The ECOWAS Court of Justice***

The ECOWAS Community Court of Justice is established under Articles 6 and 15 of the ECOWAS Treaty as the sole judicial organ of the Community. The 1991 Protocol on the Community Court defines the jurisdiction and composition of the Court. It also operationalises Article 6 and 15 of the Treaty.<sup>576</sup> The role of the Court is to essentially ensure the observance of law and justice in the interpretation and application of the Treaty, Protocols and Conventions annexed thereto.<sup>577</sup> Additionally, it is also the responsibility of the court to be seised of the responsibility of settling such disputes, as may be referred to it in accordance with the provisions of Article 56 of the Treaty; as well as any disputes between states and the institutions of the community.<sup>578</sup>

### **3.4.5.2 *Jurisdiction of the ECOWAS Court of Justice***

At its inception, the jurisdiction of the court was set out in Article 9 of the 1991 Protocol of the Court. The Court did not have a human rights mandate and only the member states and its organs had direct access to it. Consequently, private individuals or corporations did not have any direct access to it. The adoption of the supplementary Protocol A/SP.1/01/05 expanded the jurisdiction of the Court while at the same time conferred individuals with direct access to the court. Articles 9 and 10 now vest the court with powers to determine cases on violations of human rights that occur in any member state and is open to applications by individuals in that respect.

Neither the ECOWAS Protocol nor the ECOWAS Treaty provide for the supremacy of the Treaty or the decisions of the ECOWAS court over national laws or courts of Member States. However, the direct access of individuals to the Court, on the questions of human rights without

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<sup>574</sup> K Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Ashgate London 2006) 132-170.

<sup>575</sup> *ibid*, 146.

<sup>576</sup> Protocol (A/P.1/7/91) on the Community Court of Justice. <[http://prod.courtecowas.org/wp-content/uploads/2018/11/Protocol\\_API1791\\_ENG.pdf](http://prod.courtecowas.org/wp-content/uploads/2018/11/Protocol_API1791_ENG.pdf)> accessed on 11<sup>th</sup> September 2018.

<sup>577</sup> *ibid*. See the preamble to the Protocol.

<sup>578</sup> *ibid*.

requiring one to first exhaust local remedies, demonstrates at least one quality of supranationalism, albeit to a limited scope. The ECOWAS Court has consistently held that exhaustion of local remedies is not a precondition for an individual accessing the court.<sup>579</sup> The Court put it most succinctly in its decision in the case of *Hadijatou Mani Karaou v the Republic of Niger*.<sup>580</sup> The Court held that

[t]he absence of the requirement for preliminary exhaustion of local remedies in Article 10 is not a lacuna which must be filled with the practice of the Court since the Court cannot impose on individuals more onerous conditions and formalities than those provided for by the texts without infringing on the rights of such individuals.<sup>581</sup>

### **3.4.6 The Organisation for Harmonisation in Africa of Business Laws (OHADA)**

OHADA is the French-language acronym for the Organisation for Harmonisation in Africa of Business Laws. Though its name refers to harmonisation; the organisation goes further than harmonisation to also make uniform laws.<sup>582</sup> The organisation has seventeen member states.<sup>583</sup> OHADA was launched in 1993 when member states signed the OHADA Treaty. The Treaty has been amended only once, in 2008.

#### **3.4.6.1 Structure and Organs of OHADA**

The most powerful aspect of OHADA is its Uniform Acts. Once adopted by OHADA legislature, the Council of Ministers automatically become part of each member state's internal municipal law after ninety days.<sup>584</sup> The OHADA Treaty also provides that the Uniform Acts shall have direct

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<sup>579</sup> See, for example, the Court's decision in *Musa Saidu Khan V the Gambia* [2010] CCJELR.

<sup>580</sup>(2008) AHRLR 182, ECOWAS.

<sup>581</sup> Ibid, 5-6.

<sup>582</sup> In French "Organisation pour l' Harmonisation en Afrique, du Droit des Affaires". *Journal de l' OHADA* 1 (Nov.1.1997) (OHADA Treaty) <[https://www.ohada.org/attachments/article/7/OHADA\\_Treaty-EN\\_Reviewed.pdf](https://www.ohada.org/attachments/article/7/OHADA_Treaty-EN_Reviewed.pdf)> accessed on 20<sup>th</sup> September 2018.

<sup>583</sup>Benin, Burkina Faso Central Africa Republic, Chad, Cameroon, Comoros, Congo, Cote d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea-Bissau, Mali, Niger, Senegal and Togo.

<sup>584</sup>Articles 10 of the OHADA Treaty.

effect, thereby allowing any party to rely upon its provisions 30 days after their publication in the OHADA official journal.<sup>585</sup>

The two central principles of supranationalism, direct effect and supremacy, are found in the OHADA regulation of business laws anchored in the Uniform Acts. The Act establishes the common laws in the areas of: company law, general commercial law, securities, enforcement measures, insolvency, arbitration, accounting law and transportation. The direct effect of these laws therefore exhibit OHADA's supranational inclination. National parliaments play no role in the approval of the Uniform Acts and cannot modify the text post their adoption.<sup>586</sup> Therefore, the Uniform Acts must be business laws.<sup>587</sup> The Uniform Acts are designed to attract foreign direct investments.<sup>588</sup> A 2008 amendment added the conference of Heads of State and Government to OHADA organs.<sup>589</sup> The OHADA Permanent Secretariat is another important organ. It is headed by the Permanent Secretary, appointed by the Council of Ministers.<sup>590</sup>

#### **3.4.6.2 The OHADA Common Court of Justice and Arbitration (CCJA)**

The CCJA is a supranational apex court of the OHADA.<sup>591</sup> The CCJA has three principal roles. The first is to review the draft uniform Acts, verify the same before it is adopted by Council of Ministers.<sup>592</sup> The second role is to supervise arbitration effected by the arbitration centre sheltered under the CCJA's wing.<sup>593</sup> The third and most significant, is ensuring that the OHADA statutes'

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<sup>585</sup>Article 9 of the OHADA Treaty.

<sup>586</sup>CM Dickerson, "The OHADA Arbitration: Exogenous Forces Contributing to its Influences" (2016) *Duke J. COM & INT'L L* 63-88, 65.

<sup>587</sup> Article 10 of the OHADA Treaty.

<sup>588</sup>CM Dickerson, "Harmonising Business Laws in Africa: OHADA calls the Tune" (2005) 225(44) *Columbia Journal of Transnational Law* 17-20.

<sup>589</sup> Article 27 of the OHADA Treaty.

<sup>590</sup> Article 40 of the OHADA Treaty.

<sup>591</sup> Dickerson CM, (n) 586, 1. See also, B Fagbayibo, "Towards the Harmonisation of Laws in Africa: Is OHADA the Way to go?" (2009) *CILSA* 309-322.

<sup>592</sup> Article 7 of the OHADA Treaty.

<sup>593</sup> Articles 21-26 of OHADA Treaty.

uniform texts are interpreted in a uniform manner.<sup>594</sup> The OHADA CCJA also hears appeals from penultimate national courts and the CCJA's decisions, on such appeals, are final.<sup>595</sup> Additionally, National Courts of members states are required to interpret and apply the Uniform Acts.<sup>596</sup> The CCJA, therefore, has an overarching supremacy over national courts. Moreover, The CCJA's decisions have a direct effect and are superior to national courts, although national courts play a complementary or subsidiary role to the CCJA.

It is important to note that OHADA is not, *per se*, an effort at integration, but is rather a region with common business laws. It, however, presents a useful experiment on a common regional transnational supranational dispute resolution system. It is also a distinctively crafted African tool, fashioned by Africans, for Africa. It is, therefore, the closest one can find of a process of harmonisation of commercial laws that has operated fairly successfully in Africa's unique socio-economic, cultural and political contexts. Studies on the OHADA dispute resolution model have largely been around the workings and efficacy of the common court and arbitration under the OHADA Agreement on enabling laws.<sup>597</sup> Since the continental integration envisaged under the AEC treaty is to end in harmonisation of laws, the OHADA approach becomes a useful reference point.<sup>598</sup> Although the system has been effective in settling commercial and investment disputes, it may not necessarily be effectively adopted for trade disputes. Inter-state disputes are largely trade related and the system best suited for the settlement of such disputes is in RECs and

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<sup>594</sup> GK Douajini, "The Arbitration Procedure before the CCJA" (2010) 3 *African Uniform Law Review* 28 <[www.ohada.org](http://www.ohada.org)> accessed on 20<sup>th</sup> September 2018.

<sup>595</sup> Article 29 of the OHADA Treaty.

<sup>596</sup> HJ Merryman, "How others do it: The French and German Judiciaries" (1988) 61 *CALL REV* 1865, 1867-69.

<sup>597</sup> See, for example, E Onyema, (2010) "Enforcement of Arbitral Awards in Sub-Sahara Africa" (2010) 26(1) *Arbitration International* 115-138. See also, N Martor and D Pilkington D and DS Sellers and S Thouvenot S "Business Laws in Africa: OHADA and the Harmonisation Process" (2<sup>nd</sup> Edition GMB Publishing UK 2007) 267-271.

<sup>598</sup> B Fagbayibo, (n) 591, 311-312, distinguishes between the concepts of "harmonisation" and "unification" of laws and also draws conceptual parallels between the two. He underscores that harmonisation is the "incorporation of different legal systems under a basic framework... where common standards take precedence over national laws of members", while unification connotes the creation of an entirely new legal system replacing the existing legal systems of member states.

their judicial organs. Fagbayibo observes that differences in language, legal traditions, and democratic deficit in Africa militate against seeing the largely francophone OHADA as a model for Africa's continental economic integration.<sup>599</sup> Instead, he advocates for an approach that views RECs as the focal point for building continental integration.<sup>600</sup>

### **3.4.7 The Central African Economic and Monetary Community (CEMAC)**

CEMAC is an organisation established in 1961 meant to promote monetary cooperation amongst francophone central African states. It is the successor of the Customs Union of Central Africa (UDEAC).<sup>601</sup> Its aim is to create a common market, to harmonise laws and to sectorial policies, as well as to promote the convergence of macro-economic policies of member states. CEMAC is made up of the following institutions: the Council of Ministers, the Community President, the community parliament, the Court of Justice, and the bank of the Central African States (BEAC).

The BEAC is modelled to be a supranational institution responsible for issuing the common currency, the CFA Franc, and also controls the monetary policy of the integration Unit. CEMAC has in place harmonised financial and legal regulatory mechanisms for businesses.<sup>602</sup>

The supremacy of community law over national laws, as a feature of supranationalism, is underlined both in the Treaty establishing CEMAC and national Constitutions of member states.<sup>603</sup> The observance of CEMAC laws is guaranteed by the possibility of sanctions.<sup>604</sup> The principle of primacy of community law and its overriding effect over national laws of member states, is

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<sup>599</sup> *ibid*, 317-319.

<sup>600</sup> *ibid*, 319-320.

<sup>601</sup> Established in 1994 and operationalised in 1998. Its membership includes Cameroon, the Central African Republic, Chad, Congo-Brazzaville, Equatorial Guinea and Gabon. The Revised CEMAC Treaty is available at [http://www.cemac.int/Traites\\_Conventions](http://www.cemac.int/Traites_Conventions), accessed on 23<sup>rd</sup> September 2019.

<sup>602</sup> UNECA Report (2004) *Assessing Regional Integration in Africa* (AU and UNECA: Addis Ababa) 29.

<sup>603</sup> For Example, section 45 of the Constitution of Cameroon provides that "Duly approved or ratified treaties and international agreements shall, following their publication override national laws, provided the other party implements the said treaty or agreement."

<sup>604</sup> Articles 14 and 17 of the Addition to the CEMAC Treaty.

underscored by an understanding that community law shall prevail in the event of contradiction or incompatibility between the two sets of laws.<sup>605</sup>

The principle of direct effect or direct applicability manifests itself in CEMAC on at least at two levels.<sup>606</sup> Firstly, the principle holds that community laws are passed into member nations' legal order without the need for any national measures of transposition or reception.<sup>607</sup> Secondly, the CEMAC Court of Justice has the powers to render decisions that are compulsive to member states. Article 5, of the Convention regulating the Court, states that the rulings of the Court has the authority of decided cases and executory force.<sup>608</sup>

### 3.5 Summary

This Chapter has discussed the various efforts at establishing supranational regional courts at both continental and sub-regional levels in Africa. The structural and institutional features and jurisdiction of the courts have also been highlighted. Several similarities and differences were noted.

Firstly, while most of the courts were created under RECs, some have since expanded their jurisdiction to include human rights and international crimes.<sup>609</sup> Scholars' opinions are split on whether this is good for the regional courts. Some view the metamorphosis from a pure economic integration to include human rights as being antithetical to the economic integration objective for which the RECs

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<sup>605</sup>M Bongyu "The Economic and Monetary Community of Central Africa (CEMAC) and the Decline of Sovereignty" (2009) *Journal of Asian and African Studies*, 389-406, at 393.

<sup>606</sup> Article 21 of the Addition to the CEMAC Treaty.

<sup>607</sup> M Bongyu, (n) 606, 393.

<sup>608</sup>B Boumakani, Community Jurisdiction in Francophone Africa : The OHADA Common Court of Justice and Arbitration" (1999) *Annals of the Faculty of Juridical and Political Sciences, University of Dschang, Presses. University of Africa* 68-76.

<sup>609</sup> For example, the EAC and ECOWAS now have specific human rights jurisdictions. See the discussion in 3.4.1.2 and 3.4.5.2 above. Gathii (2016) observes that while the expanded jurisdictions of the court seem to be the trend in African RECs, the same has been received with reluctance by some REC member states. The jurisdictional mandate of economic community courts to entertain human rights grievances has also remained doubtful and problematic, in the absence of express treaty prescription. However, RECs have chosen to interpret their jurisdiction widely as conferring human rights jurisdiction. J Gathii, (n) 83 above, at 250-252.

and courts were set up in the first place.<sup>610</sup> This school of thought advances that it is the introduction of human rights, political disputes, international criminal law into the realm of what was originally intended to be purely trade and investment courts that has led to the resistance of the courts by member states to the RECs.<sup>611</sup> The opposite school of thought asserts that democracy and human rights are imperative for any integration effort including economic integration.<sup>612</sup> This ideological school, therefore, argues that the expansion of the courts' mandate to include human rights and international crimes jurisdictions is a welcome move towards ensuring that human rights standards and democracy are inculcated in the integration organisation's members.<sup>613</sup>

Secondly, the foregoing discussion has established the following features as being critical for an efficacious continental dispute resolution system for the African continent and include: direct effect of the courts' decisions, access by individuals (both natural and juristic), supremacy of the courts' decisions on questions of regional law, and consistency in the application of the law. This thesis aims at fashioning an appropriate continental trade and investment dispute settlement system under the ACJ&HR. The afore-listed features are imperative for an effective continental trade and investment dispute settlement system. These features form the substratum of the next chapter.

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<sup>610</sup> See, for example, K Alter and J Gathii and L Helfer, (n) 59, 327-328.

<sup>611</sup> RO Frimpong, "Legitimacy of Regional Economic Integration Courts in Africa" (2014) *Africa Journal of Legal Studies* 63-65. See also, R Simo, "A Future Court Without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism" (2019) *Afronomicslaw* [4] <<http://www.afronomicslaw.org/2019/08/19/a-future-court-without-cases-on-the-question-of-standing-in-the-afcfta-dispute-settlement-mechanism/>> accessed on 20<sup>th</sup> September 2019.

<sup>612</sup> For example, P Apiko, (n) 480 14-15. B Fagbayibo advances the need to inculcate democracy, the rule of law and respect for human rights in the AfCFTA integration project. See B Fagbayibo "A Case for Democratic Legitimacy of the AfCFTA Process" (2019) <<http://www.afronomicslaw.org/2019/01/16/a-case-for-democratic-legitimacy-of-the-afcfta-process/>> accessed on 20<sup>th</sup> September 2019.

<sup>613</sup> In discussing the place and role of human rights litigation before the EACJ, J Gathii considers the fact that 90% of the cases before the EACJ being human rights cases, and the success of such cases as an important contribution by the court in the sub-region's economic integration even in the absence of specific human rights jurisdiction in the EAC Treaty. See, J Gathii, "Variation in the use of sub-regional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice" (2016) 79 *Law and Contemporary Problems* 37-62, at 59-62.

## CHAPTER FOUR

### THE ROLE OF THE AU SINGLE COURT IN RESOLVING TRADE AND INVESTMENT DISPUTES: JURISDICTIONAL, STRUCTURAL AND INSTITUTIONAL IMPERATIVES

#### 4.1 Introduction

Dispute settlement has been described as the “backbone of the multilateral trading system.”<sup>614</sup> The importance of an efficient, effective and accessible dispute resolution mechanism cannot be over-emphasised. Disputes in economic integration efforts primarily take the two forms of trade and investment disputes. Most RECs in Africa including the AEC seem to only anticipate and, therefore, legislate for trade disputes. Even in so doing, trade remedies and dispute resolution seem to mainly be availed to state parties to the integration process.

The history of African countries in international trade litigation has been aptly described as generally being unsatisfactory.<sup>615</sup> This is primarily because African countries have been unable to implement compatible multilateral trade remedies, at the WTO level.<sup>616</sup> At the continental level, the preferred dispute settlement systems seem to be inclined towards resolving inter-member state disputes with little, if any, regard to investor related dispute resolution.

Three explanations have been offered for this state of affairs. Firstly, is that African states are not active users of international trade dispute settlement systems. Most believe that to provide for a stringent trade and investment dispute resolution regime is to disrespect the integration effort by suggesting that disputes may arise.<sup>617</sup> Secondly, that African states lack the technical capacity and resources to engage at the multilateral trade dispute settlement stage and would, therefore,

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<sup>614</sup>A Saurombe, “Regional Integration Agenda for SADC “Caught in the Winds of Change” Problems and Prospects” (2009) 4(2) *Journal of International Commercial Law and Technology* 100-106, 103.

<sup>615</sup>G Erasmus, (n) 276. See also G Erasmus in T Hertzberg and others (n) 276.

<sup>616</sup>G Erasmus, “Alternative Dispute Settlement Procedures for Trade Related Disputes in Africa” (2018) <<https://www.tralac.org/blog/article/13527-alternative-dispute-settlement-procedures-for-trade-related-disputes-in-africa.html>> accessed on 4<sup>th</sup> October 2018, 3.

<sup>617</sup>G Erasmus (n) 276, 4.



rather recuse themselves from engaging therein.<sup>618</sup> Thirdly, it is suggested that African countries prefer informal or diplomatic settlement of trade disputes.<sup>619</sup>

Effective dispute resolution is important for both local and foreign investors. It guarantees legal certainty and predictability in markets and provides remedies when rights are violated.<sup>620</sup> Effective dispute resolution and implementation are, therefore, critical in the economic integration process. Saurombe highlights the importance of dispute resolution in Africa, with regard to integration efforts, by stating that the private sector in the region is unlikely to adjust their long-term strategic investment planning, unless international agreements are backed by strong, rule-based and objective third party adjudicative systems.<sup>621</sup> Inter-state dispute resolution is important to partner states in a REC; just as much as the resolution of disputes resulting from private commercial and state–investor commercial transactions.<sup>622</sup> Hertzberg strongly advocates for a rule–based regime that provides for certainty, predictability and transparency, for regional trade and investment to thrive.<sup>623</sup>

Most trade transactions involve private parties who comprise traders in goods, service, and who are also owners of investment capital. Intra-Africa trade can only thrive in an environment where legal remedies are availed to both the state and investors alike. The consequence of the state of affairs in Africa is that the absence of an all-encompassing and efficient dispute settlement system is costly to states and investors alike.<sup>624</sup> The benefits of predictability and finality of dispute resolution are brought about by the removal of uncertainties, on the law applicable, the scope of rights, as well as the obligations of parties in international trade.<sup>625</sup> Another advantage of an effective trade and investment regime is that African trade practice will develop the much needed

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<sup>618</sup>G Erasmus (n) 276, 3.

<sup>619</sup> *ibid.*

<sup>620</sup>T Chidede, (2018) “Investment Dispute Resolution under the Amended Annex 1 of the SADC FIP” (2018) <<https://www.tralac.org/blog/article/13526-investment-dispute-resolution-under-the-amended-annex-1-of-the-sadc-fip.html>> accessed on 4<sup>th</sup> October 2018, 3. A Saurombe, (n) 614, 104.

<sup>621</sup>A Saurombe, (n) 614, at 103.

<sup>622</sup>G Erasmus, (n) 612, 4.

<sup>623</sup>T Hartzenberg and others, (n) 276.

<sup>624</sup>G Erasmus, (n) 615.

<sup>625</sup>*ibid.*

jurisprudence for guiding trade policy and private commercial practice.<sup>626</sup> In negotiating economic integration, it has been observed, that African states tend to take dispute resolution as an afterthought.<sup>627</sup> This has led to the discord between regional and national systems in terms of trade and investment dispute resolution.<sup>628</sup>

This chapter consists of four substantive parts. The first part addresses the jurisdiction of the ACJ&HR with respect to its competence to resolve trade and investment disputes. The second part addresses the structural bottlenecks that impede the Court's ability to effectively discharge its mandate with respect to trade and investment disputes. The third part addresses the institutional capacity and challenges the Court faces or may potentially face in its quest to execute this mandate. The chapter concludes with a summary of the discussion undertaken in the chapter.

## **4.2 The Trade and Investment Jurisdiction of the ACJ&HR**

The first section of this part lays out a conceptual background to jurisdiction by offering a definition of the term and its essential elements. The second section offers an analysis of the trade and investment jurisdiction of ACJ&HR against the various forms and elements of jurisdiction identified and highlighted in the earlier section.

### **4.2.1 Jurisdiction of International Tribunals: An overview**

Jurisdiction is a term that defies a universal definition. However, the term, as used in this discourse, encompasses elements common to its varied definitions and uses. Jurisdiction, with respect to adjudicative authority, has been defined as a court's power to decide a case or issue a decree.<sup>629</sup>

The notion of jurisdiction in international law is founded upon classical principles as applied in national law. Two forms of jurisdiction are exercised by states in public international

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<sup>626</sup> G Erasmus, (n) 276, 3.

<sup>627</sup> RF Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 4.

<sup>628</sup> C Siziba, "Trade Dispute Settlement is the Tripartite Free Trade Area" (2016) 2 *World Trade Institute (WTI) Working Paper No. 02/2016*. <[https://boris.unibe.ch/101644/1/wti\\_seco\\_wp\\_02\\_2016.pdf](https://boris.unibe.ch/101644/1/wti_seco_wp_02_2016.pdf)> accessed on 6<sup>th</sup> October, 2018.

<sup>629</sup> BA Garner (ed), *Black's law Dictionary* (9<sup>th</sup> ed West United States of America 2009) 927.

law and consists of prescriptive/legislative jurisdiction and enforcement jurisdiction.<sup>630</sup> Prescriptive or legislative jurisdiction is described as the competence of states to create laws, recognised as valid in international law.<sup>631</sup> Enforcement jurisdiction, on the other hand, relates to a state's authority to act coercively so as to enforce its law.<sup>632</sup>

Broadly, the jurisdiction of courts and tribunals falls into two categories: civil and criminal. The concept of jurisdiction has traditionally been founded on three bases: territoriality, nationality and the principle of effect.<sup>633</sup> Of these three, territoriality is by far the most central. Territoriality denotes the exercise of a state's sovereign authority within its territorial limits (land, sea and air).<sup>634</sup> The effects theory foregrounds the ability of a state to exercise jurisdiction beyond its territory, where an infraction or action impinges on or affects a sovereign's laws or interests.<sup>635</sup> The nationality principle allows a state to exercise jurisdiction over their nationals for acts done within or outside the state's territory. The principle stems from the recognition that sovereign states may legitimately impose obligations on their subjects, wherever they may be.<sup>636</sup>

The jurisdiction exercised by judicial organs is referred to as adjudicative or adjudicatory jurisdiction.<sup>637</sup> This jurisdiction is the concern of this part of this chapter.

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<sup>630</sup> G Boas, *Public International Law: Contemporary Principles and Perspectives* Edward (Elgar Publishing Limited Cheltenham UK 2012) 246.

<sup>631</sup> FA Mann, "Jurisdiction in International Law" (1964) *Hague Recivil des Cours*, 109, at 111. See also, H Wasserman, "Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial exemption" (2012) 160 *University of Pennsylvania Law Review PENNumbra* 287.

<sup>632</sup> M Akehurst, "Jurisdiction in International Law" (1972) 46 *British Yearbook of International Law* 45, 179.

<sup>633</sup> G Boas, (n) 630, 250.

<sup>634</sup> *ibid*, 251.

<sup>635</sup> *ibid*, 254. See also I Brownlie, (2008) *Principles of Public International Law* (7<sup>th</sup> ed Oxford University Press Oxford 2008) 311.

<sup>636</sup> G Boas, (n) 630, 255.

<sup>637</sup> C Ryngaert, "The Concept of Jurisdiction in International Law" (2014) <<https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf>> accessed on 3<sup>rd</sup> October, 2018.

The adjudicative jurisdiction of courts or tribunals refers to its competence to hear and adjudicate legal questions or issues.<sup>638</sup> Jurisdiction demarcates the powers of a court to determine a case in terms of an instrument either creating the court or defining its jurisdiction.<sup>639</sup> Jurisdiction of courts, competence, mandate or remit are terms often used interchangeably to refer to the same concept.

The finality and binding effect of a court or tribunal's decision is a critical aspect of its jurisdiction.<sup>640</sup> Generally, courts and tribunals are restricted to act within their jurisdiction, and acts or decisions of judicial bodies that exceed their jurisdiction are considered *ultra vires*, and, therefore, null and void.<sup>641</sup>

The founding or constituting instrument of an international organisation is the primary source of its authority, mandate and powers.<sup>642</sup> Often times, the mandate of such organs, including judicial organs, are couched in wide terms or in ambiguous wording.<sup>643</sup> It is in such circumstances that tribunals, in their interpretive role, proceed to apply a flexible approach to the reading of the founding instrument. A strict and rigid interpretation or reading of an international judicial organ's jurisdiction denotes an approval of the express powers approach, while a permissive liberal reading is regarded as approving of the implied powers approach. A brief illustration of these two concepts,

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<sup>638</sup>AB Spenser, "Jurisdiction to Adjudicate: A premised Analysis" (2006) 73 *University of Chicago law Review* 617-672, 617.

<sup>639</sup>B Chelf, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge University Press, Cambridge 2006) 132.

<sup>640</sup>S Rosenne, *The Law and Practice of the International Court 1920-1996*. Vol II (Martinus Nijhoff publishers The Hague 1997) 259.

<sup>641</sup>WM Riesman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 *American Journal of International Law* 866-876, 128.

<sup>642</sup>I Brownlie, (n) 635, 651. See also, L Bartels, "Jurisdiction and Applicable Law Clauses: Where does a Tribunal find the Principal Norms applicable to the Case before it?" in I Bander and Y Shany (eds), *Multisourced Equivalent Norms in International Law* (Hart publishing Oxford 2011) 115-141, at 115.

<sup>643</sup>C Warbrick, "The Jurisdiction of the Security Council: Original Intention and New World Order(s)" in P Capps, and E Malcom (eds) *Asserting Jurisdiction-International and European Legal Perspectives* (Hart-publishing oxford and Portland 2003) 127-143, at 129.

as they apply to international tribunals in general, and the ACJ&HR in particular, will now follow.

#### ***4.2.1.1 Express Powers of the ACJ&HR***

International tribunals, ordinarily, draw their powers from their founding instruments adopted by member states. In the case of the ACJ&HR, the ACJ&HR Protocol, the Court's Statute and Rules of Procedure are the fundamental sources of the Court's jurisdiction. These instruments expressly provide for the jurisdiction of the Court. Article 28 of the Statute of the ACJ&HR delimits the extent of the Court's jurisdiction. Article 28 of the Court's statute is, therefore, an express provision of the jurisdiction of the Court.

Commentators who are inclined towards a strict reading and application of the powers of an international tribunal, in determining its jurisdiction state how international tribunals should not seek to expand or engage in creatively enlarging their jurisdiction beyond what has been stipulated in their founding treaties or protocols. This is the express powers approach. For example, Nkatha asserts that any attempt by an international judicial organisation to impose new obligations on its member states would be an act falling beyond the powers originally given to the institution to interpret the treaty.<sup>644</sup> Essentially, this thinking is to the effect that judicial bodies should not purport to legislate through their decisions but should apply the law/treaties as they are, without expanding them. This approach seems to bode well with the constitutional principle of separation of powers where legislative organs legislate or make laws, while judicial organs interpret the law and apply it.

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<sup>644</sup>MJ Nkatha, "The Role of Regional Economic Communities in Protecting and Promoting Human Rights: Reflections on the Human Rights Mandate of ACJ&HR and the Tribunal of the Southern African Development Community" (2012) 20 *African Journal of International and Comparative Law* 97. See also AIL Campbell, "The Limbs of the Powers of International Organisations" (1993) 32 *International and Comparative Law Quarterly* 523-535, at 523. See generally, M Bohlander, "Separation of Powers and the International Judiciary- A Vision of Institutional Judicial Independence in International Law" (2011) 269-280, in S Shimon and C Forsyth (eds) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*. International law e-books online, collection 2011 <<https://brill.com/view/book/edcoll/9789004215856/B9789004215856-s013.xml>> accessed on 20<sup>th</sup> October 2018.

The Statute of the ACJ&HR seems to have elaborately provided for the human rights and international criminal law aspects of the Court's jurisdiction.<sup>645</sup> However, the Statute deals with the powers of the General Chamber of the Court, where trade and investment matters would naturally fall, in a rather broad and permissive manner.<sup>646</sup> If Nkatha's view was to hold, it would mean that the ACJ&HR's jurisdiction to entertain, hear and determine matters related to investment and trade under the AEC Treaty would be an act falling beyond the powers originally given to the court by its founding statute.

Nkatha is not alone in her views. Murungi and Gallinetti assert that the notion of express powers requires that a tribunal performs its duties within the scope of its authority as expressly set out in the constitutive document.<sup>647</sup> The alternative, they advance, would have a negative impact on the tribunal's decisions, if its rulings are regarded as going beyond the power of the tribunal. Challenges to the legitimacy of the decision may follow, including providing an incentive for non-observance of the decision.<sup>648</sup> According to Murungi and Gallinetti, the incentive to observe decisions made by international tribunals has a direct correlation with the tribunal's strict observance of its jurisdictional limits. A tribunal that exceeds the strict confines of its jurisdiction invites aggrieved parties to disregard or disobey its orders.

However, a number of questions arise. What happens in the event of lack of clarity on the tribunal's jurisdiction? Or, where there is a lacuna or lack of specificity in the founding instrument, with respect to the jurisdiction of an international tribunal? Is the tribunal helpless in the face of such difficulty? In a practical sense: what should one see as being the extent of the jurisdiction of ACJ&HR with respect to trade and investment disputes? Should there be room for the Court to

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<sup>645</sup>Article 28 of the Statute and 28A –N of the Amendment Statute elaborately sets out the jurisdiction of the Human Rights and International Criminal Law Sections of the Court without a similarly detailed expansion of the jurisdiction for the General section of the Court.

<sup>646</sup> Articles 16, 17 and 28 of the Statute of the ACJ&HR creates the General Section of the Court whose jurisdiction is to hear all cases submitted under Article 28 of the Statute save those concerning Human and Peoples' Rights.

<sup>647</sup>LN Murungi and T Gallinetti, "The Role of Sub Regional Courts in African Human Rights System" (2010) *Human Rights Law Journal* 119-143, at 132.

<sup>648</sup>*ibid.*

interpret the Statute of the Court in a permissive and liberal manner so as to read into it its jurisdiction in settling trade and investments disputes, pursuant to the implied powers approach?

#### 4.2.1.2 Implied Powers of ACJ&HR

Often times, there are controversies and disputes as to the actual competencies of international tribunals.<sup>649</sup> This problem is not unique to African international organisations. The International Court of Justice (ICJ), in its decision in the case of *Reparations for Injuries Suffered in the Service of the United Nations*,<sup>650</sup> adopted a flexible, liberal and permissive approach to the interpretation of the competency of international organisations.<sup>651</sup> In the case, the UN General Assembly requested an advisory opinion from the ICJ on, *inter alia*, whether the UN had the capacity to bring an international claim against the responsible government for reparations on behalf of people who had died while in the service of the UN. The ICJ observed that the Charter of the UN “does not expressly confer upon the organisation the capacity to include, in its claim for reparations, damages caused to the victim or to persons entitled through him”.<sup>652</sup> The Court then proceeded to hold that in terms of international law, an organisation must be construed as having, by implication, been given powers necessary to discharge its duties.<sup>653</sup>

The implied powers approach has been accepted at international law in three other landmark decisions of the ICJ.<sup>654</sup>

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<sup>649</sup> C Warbrick, (n) 643, at 237. Lauterpatch (1997) has offered a proposition that, “National Sovereignty ends where...international obligations begin”. See H Lauterpatch, “Sovereignty-Myth or Reality” (1997) *International Affairs* 149.

<sup>650</sup> Advisory opinion, 1949 ICJ report 174 (hereinafter Reparation Case)

<sup>651</sup> C Warbrick, (n) 643, 237.

<sup>652</sup> *Reparations case*, Advisory opinion, 1949 ICJ Report at 182.

<sup>653</sup> *ibid*.

<sup>654</sup> See also, the *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* 1996 ICJ Reports 226; *Advisory opinion on Competency of the International Labour Organisation to Regulate Incidentally, the Work of the Employer*. ICJ services B-No 13 23rd July 1926; and the *Certain Expenses of the UN (Article 17, paragraph 2 of the Charter)* 1962 ICJ Report 159. In all these cases, the intention rather than the letter of the founding instrument was given effect as according the organs the powers essential to the performance of their duties.

The implied powers approach has also been accepted and used by REC tribunals in Africa. For instance, the EACJ, in its decision in the case of *Sitenda v Secretary General of the EAC and Another*<sup>655</sup> stated that despite not having express appellate jurisdiction over decisions rendered by national supreme courts, entertained and determined an application filed as an appeal from the Supreme Court of Uganda. The Court justified this by stating that the matter dealt with questions relating to breach of the EAC Treaty. In three other cases, the EACJ held that it would amount to abdicating its duty of interpreting and applying the EAC Treaty if it failed to recognise an individual's right to raise human rights questions before it. An expanded interpretation of Article 6 and 7 of the EAC Treaty were found to confer implied jurisdiction on the Court to deal with questions of human rights as between individuals and state members.<sup>656</sup> The SADC tribunal, in the *Mike Campbell* case, interpreted the SADC treaty in a liberal manner so as to give effect to the right of individuals to access the Court as a matter of right and for the Court to entertain claims of breaches, by a member state, of human rights obligations enshrined in the SADC Treaty.<sup>657</sup>

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<sup>655</sup>EACJ (2011b) <<http://eacj.eac.int/?cases=hon-sitenda-sebalu-vs-the-secretary-general-of-the-east-african-community-3>> accessed on 2<sup>nd</sup> October 2018. The EACJ in *East African Civil Society Organisation Forum v The Attorney General of the Republic of Burundi and 2 Others* (2017) KLR, declined to take up implied jurisdiction choosing to state that its power and in interrogating matters related to the EAC Treaty and not to sit on appeal from member national courts or reopen matters determined by member national courts.

<sup>656</sup> *In Katabazi & 21 others v Secretary General of the EAC* (2007) EACJ at p. 3; *Praxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2011C) and *Independent Medico Legal Unit v Attorney General Kenya 2011a*); while acknowledging that Article 27 of the EACJ treaty divests the human rights jurisdiction from it, the EACJ nonetheless underscored its role under Article 7 of the Treaty, to interpret the EAC Treaty, as being expansive enough to enable it deal with breaches of the Treaty, including those of a human rights nature. These cases are also available at <[http://eacj.eac.int/?page\\_id=2414](http://eacj.eac.int/?page_id=2414)> accessed on 2<sup>nd</sup> October 2018. Gathii observes that “in assuming jurisdiction over human rights cases, the EACJ has effectively arrogated to itself the power to establish the validity of the conduct of member states in this newly constitutionalized regional human rights regime. It has exercised jurisdiction over human rights notwithstanding the Council of Ministers’ failure to formally extend such jurisdiction ... As such, its human rights case law goes far beyond the scope that the Treaty explicitly contemplated.” See, J Gathii, (n)83, 253.

<sup>657</sup>*Mike Campbell Pty Ltd and Others v Republic of Zimbabwe* (2/2007) 2008) SADCT 2 (28 November 2008).



Hay put it most aptly, that the supranationalism of an international organisation does not necessarily depend on express stipulations, but rather flows from powers and functions actually accorded to an organisation.<sup>658</sup>

The Statute of the ACJ&HR is inadequately worded with respect to its General Section's competence to entertain claims by individuals in trade and investment disputes, and the remedies it may avail such parties. The implied powers approach would, therefore, be useful to ensuring the Court's ability to discharge its functions. As the ICJ put it in the *Reparations case*, the founding instrument of the Court should be interpreted in a manner that enables the organisation fulfil its mandate.

Klabbers advances that the tensions between express and implied powers will persist, but the latter is more attractive because it is more concerned with the protection of community interests while the former appears to cling on to the old notion of state sovereignty.<sup>659</sup> Brownlie is of the considered opinion that the doctrine of implied powers may be used to interpret an organisation's founding instrument.<sup>660</sup> This will see the ends of justice being met, particularly where Statute is either vaguely or generally crafted.

#### **4.2.2 Towards a Supranational ACJ&HR: The Trilogy of Supremacy, Direct Effect and the Preliminary Ruling Procedure**

The AEC is envisioned to emulate the supranational status and success of the EU. It has been suggested that the underlying intention of the architects, of the Constitutive Act of the AU, was to create a supranational entity through conferring supranational powers on its organs and institutions.<sup>661</sup> The AU single Court is modelled as one of the organs which are expected to develop AEC law and jurisprudence. It is also expected to have jurisdiction over member states throughout the continent. The three elements of supremacy, direct effect and use of the preliminary ruling procedure are often used to achieve or assess the supranationalism of an international judicial organ.

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<sup>658</sup>P Hay, *Federalism and Supranational Organisations* (University of Illinois Press Urbana and London 1966) 30.

<sup>659</sup>SD Klabbers, *Sovereignty: Organised Hypocrisy* (Princeton University Press UK 1999) 6.

<sup>660</sup>I Brownlie, (n) 635, at 651.

<sup>661</sup>B Fagbayibo, (n) 114, 496.

#### 4.2.2.1 Supremacy

Supremacy, in this context, refers to the overriding status of community law over the national laws, including constitutions, of member states of an integration effort. Similarly, decisions of judicial organs of the integration effort override those of national courts, including constitutional and supreme courts.

Fitzmaurice describes supremacy as “one of the great principles of international law, informing the whole system and applying to every branch of it.”<sup>662</sup> Supremacy of international law, generally seeks to subordinate the sovereignty of states to international law.<sup>663</sup> A manifestation of supremacy of international law is its precedence over domestic law.<sup>664</sup> In the event of conflict between international law and domestic law, international law will prevail in the legal order with domestic law being considered only as a fact from the standpoint of international law.<sup>665</sup>

The principle of supremacy of international law is at the heart of international rule of law, which requires that states exercise their powers in accordance with international law.<sup>666</sup> The principle, to the effect that international law is supreme over domestic law and the concept of

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<sup>662</sup>G Fitzmaurice, “The General Principles of International Law Considered from the Standpoint of the Rule of Law” (1957) 92 (2) *Recueil des cours* 85. Schneider states that supremacy reflects a member state’s willingness to relinquish sovereignty. A Schneider, “Getting Along: The Evolution of Dispute Resolution in International Trade Organisations” (1999) *Michigan Journal of International Law* 703.

<sup>663</sup>*ibid*, 6.

<sup>664</sup>Scholars have examined the role of three elements of: Supremacy, Direct effect and Standing, and have concluded that these elements determine the level of “constitutionalisation” of the organisation and hence the depth of member states’ integration. See, for example, JHH Weiler, “The Transformation of Europe” (1991) 100 *Yale Law Journal* 2403; Ernest-Ulrich Peters-Mann (1996-7) “Constitutionalism and International Organisations” (1996-96) *NW.J.INT’L L.&BUS* 398; TC O’Neal, (1996-7) “Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR” (1996-97) 17 *NW.J. INT’L L&BUS* 6; D Carreau, *Droit International* (8<sup>th</sup> ed Podone United States 2004) 43-97.

<sup>665</sup>A Nollkaemper, “Rethinking the Supremacy of International Law” (2009) 1(36) *Amsterdam Centre for International Law, University of Amsterdam* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1336946&download](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336946&download)> accessed on 21<sup>st</sup> September 2019 13.

<sup>666</sup>I Brownlie, *The Rule of Law in International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers Amsterdam 1998) 213-214. See also, G Fitzmaurice, *The Law and Procedure of the International Court of Justice, Vol. II* (Grotius Publications, Cambridge 1986) 586.

international rule of law, have a common premise; that there cannot be any rule of law without the presence of some principles being deemed of precedence over others of lesser importance.<sup>667</sup> The objective is to therefore ensure uniform application of international law norms, thus maintaining equilibrium in the international rule of law sphere. According to NollKaemper, allowing states to prioritise fundamental rules of domestic law over international law would undermine the efficacy of international law and, hence, the international legal order.<sup>668</sup>

Acceptance of international law's supremacy over domestic law has not been without challenges or even outright resistance. Reluctance by states and domestic courts in embracing the supremacy of international law at the domestic level is as old as international law itself.<sup>669</sup> Few states have declared their constitutions to be supreme, and many states determine that in the case of conflict between international law and domestic law, the will of the people as expressed in domestic parliamentary legislation would always prevail.<sup>670</sup>

A few examples will suffice in illustrating this point. In 2003, the constitutional chamber of the Supreme Court of Venezuela declared that "above the Supreme Court of Venezuelan Justice, and the effects of domestic law, there is no supranational, transnational or international court" and the decisions of such (international) organs "will not be executed in Venezuela if they contradict the Venezuelan Constitution."<sup>671</sup> The Netherlands, regarded as the foremost monist state which grants supremacy of international law even over its constitution, has initiated discussions on the need to protect its constitutional values against the effects of international decisions that may fall short of the rule of law standards.<sup>672</sup> The Supreme Court of Appeal of Malawi has held that a rule of international law that is not part of national legislation or constitution is not part of Malawian

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<sup>667</sup>A Watts, "The International Rule of Law" (1993) 36 *German Yearbook of International Law* 15-45, at 22-23.

<sup>668</sup>A NollKaemper, (n) 665, 4.

<sup>669</sup> *ibid*, 5.

<sup>670</sup>A Peters, "The Globalisation of State Constitutions" (2007) in J Nijman and A NollKaemper (eds) *New Perspectives on the Divide between International and National Law* (OUP) 251, at 260.

<sup>671</sup> Judgement 1942 of the Constitutional Chamber of the Supreme Court dated 17 July 2003, cited in the Annual Report of the Inter American Commission on Human Rights, <<http://www.cidh.org/pdf%20files/VENEZUELA%202009%20ENG.pdf>> accessed on 30<sup>th</sup> October 2018 [275].

<sup>672</sup>A NollKaemper, (n) 665, 10.

law and cannot, therefore, be applied directly.<sup>673</sup> The Court further held that the question as to whether customary international law forms part of Malawian law will depend on whether it is consistent with the country's constitution or statutes.<sup>674</sup>

A persistent challenge to supremacy of international law over domestic law also occurs when normative principles evolve beyond the initial concept which had the approval of member states.<sup>675</sup> This is common when international courts expand their remit by way of implied jurisdiction.<sup>676</sup> NollKaemper is of the considered conclusion that the acceptance of normative ideals of international law and its supremacy over domestic laws is good for both international and domestic law since the universal uniformity of principles of the rule of law and observance of international norms is guaranteed.<sup>677</sup>

#### **4.2.2.2 Direct Effect**

The principle of direct effect means that the laws of the Community, including pronouncements of the Community courts and tribunals, are enforceable in all member states' national Courts, for and against states as well as individuals. According to Dehousse, direct effect, by providing individuals with an opportunity to challenge the community and national law, altered the dynamics of the EU integration process.<sup>678</sup> Individual litigants have emerged as guardians of the integrity of the community system.<sup>679</sup>

The principle of direct effect has its normative underpinnings in the two traditional theories of application of international law in the domestic sphere: monism and dualism. There is perhaps

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<sup>673</sup> *Re Adoption of Children Act Chapter 26:01 of the Laws of Malawi and Re Chifundo James (an Infant)*, MSCA Adoption Appeal No. 29 of 2009; ILDC 1345 (MW 2009).

<sup>674</sup> *ibid.*

<sup>675</sup> T Gehring, "Treaty-Making and Treaty Evolution" in Daniel Bodansky and others, *The Oxford Handbook of International Environmental Law* (Oxford University Press Oxford 2007) 466-499.

<sup>676</sup> See the discussion on implied jurisdiction in part 4.2 of this thesis.

<sup>677</sup> A NollKaemper, (n) 665, 34.

<sup>678</sup> R Dehousse, *The European Court of Justice. The Politics of Juridical Integration* (Macmillan Press Ltd London 1998) [5] 186, 40.

<sup>679</sup> *ibid.*

a third, monism-dualism, which is a combination of the two general approaches. A brief elaboration of these fundamental theories will shape the discourse to follow.

#### **4.2.2.2.1 Monism, Dualism and Direct Effect**

The Monist approach in the application of international law essentially entails the direct observance of international law as part of the laws of the state without the necessity of domesticating the enabling treaty or convention.<sup>680</sup> Treaties and conventions, therefore, apply as a source of law of the party state upon the signing thereof and ratification. Some states exhibit the monist approach either by direct application or by express provision in their constitutions which indicate international law as being a source and/or intrinsic part of the state's law. A case in point is the Constitution of the Republic of Kenya.<sup>681</sup>

Dualism distinguishes, in its elementary sense, national domestic sources of law (such as the state's constitution and statutes) from international law instruments such as treaties and conventions. Dualist states provide, usually in their constitutions, that international law instruments entered into by the state do not automatically form part of the sources of law of the state party. The same only become applicable after domestication through domestic statutes and legislative processes.

The dualist approach is informed, partly at least, by the conventional universal constitutional principle of separation of powers inherent in the political governance of states to the effect that parliaments enact laws while the executive, which binds states to treaties and

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<sup>680</sup> Monism is built on the ideas of Hans Kelsen. For his views on the relationship between international and national law, see H Kelsen, *General Theory of Law and State* (The Law Book Exchange, New Jersey 1945) 363-38. See also, D Preshova, "Legal Pluralism: New Paradigm in the Relationship between Legal Orders" (2019) <[https://www.s3.amazonaws.com/academia.edu.documents/31611984/Denis\\_Preshova\\_Legal\\_Pluralism\\_New\\_paradigm\\_in\\_the\\_relationship\\_between\\_legal\\_orders\\_final.pdf?response-content-disposition=inline%3B%20filename%3DLegal\\_Pluralism\\_New\\_Paradigm\\_in\\_the\\_Rel.pdf](https://www.s3.amazonaws.com/academia.edu.documents/31611984/Denis_Preshova_Legal_Pluralism_New_paradigm_in_the_relationship_between_legal_orders_final.pdf?response-content-disposition=inline%3B%20filename%3DLegal_Pluralism_New_Paradigm_in_the_Rel.pdf)> accessed on 21<sup>st</sup> September 2019, 3-4.

<sup>681</sup> Article 2(5) and 2(6) of the Constitution of Kenya provides:

“(5) The general rules of international law shall form part of the law of Kenya

(b) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

conventions in international law, usually implement the law.<sup>682</sup> It is, therefore, based on this constitutional principle that many dualist constitutions find it necessary to require the domestication of international norms and instruments through domestic parliamentary legislation.

The other reason advanced in favour of the dualist approach is the fact that some international treaties and conventions are not self-executing and may rely on municipal laws for enforcement.<sup>683</sup> It is also suggested that the process of domestication aids in mitigating and/or obviating inconsistencies and probable contradictions of international agreements with existing national laws.<sup>684</sup>

The dualist approach is also expressed in Articles 11, 14, 15 and 16 of the *Vienna Convention on the Law of Treaties*.<sup>685</sup> The aforementioned provisions of the Convention underscores that treaties do not automatically become part of the corpus of a state party's laws unless and until the same have been domesticated pursuant to national legislation providing for the procedure therefor.

The monist-dualist approach exhibits traits or tendencies of both the monist and dualist approach, depending on the international law to be interpreted or applied. Monist-dualists justify their hybrid approach to the practicality and peculiarity that attends the observance of international

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<sup>682</sup> The principle of separation of powers is attributed to the 18<sup>th</sup> century French philosopher Montesquieu who is also referred to as the 'father of the Constitution'.

<sup>683</sup> These may include international agreements on human rights whose enforcement often require domestic interventions.

<sup>684</sup> This is also known as the doctrine of *lex posterior derogat prior*, which essentially means that a later law or rule repeals or supersedes an earlier one.

<sup>685</sup> Concluded in 1966 and came into force in 1980. The Convention is the primary and principal instrument that codifies principles of interpretation of international treaties and agreements

<<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> accessed on 21<sup>st</sup> September 2019.

law norms, particularly treaties in their varied forms.<sup>686</sup> International law instruments fall into two categories: those that are self-executing and those that require the aid of domestic mechanisms for enforcement or execution.<sup>687</sup> The former category is often said to apply without the necessity of domestication.<sup>688</sup> The latter, which include more complex or involving international agreements, and cover the rest of the agreements, including those creating human rights obligations, require domestication.<sup>689</sup>

#### **4.2.2.2.2 The Duality of Direct Effect of International Law**

The direct effect of international law has been aptly described as being both a sword and a shield.<sup>690</sup> It has been said to “function as a powerful sword that can pierce the boundary of the national legal order and protect individual rights where national law falls short.”<sup>691</sup> This sword function is particularly strong in cases where courts can combine the two principles of direct effect with supremacy of international law.<sup>692</sup> For example, if an international law collides with national law, an international law can only be of aid to a party if it is superior to the national law.<sup>693</sup>

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<sup>686</sup> Bogdandy (2008) argues that the two approaches to international law, Monism and Dualism are antiquated and are now ‘legal zombies’ overtaken by current realities. He advocates for legal pluralism instead. See AV Bogdandy, “Pluralism, Direct Effect, and the Ultimate Say” (2008) 6 *International Journal of Constitutional Law* 400.

<sup>687</sup> Developments such as globalisation and fragmentation of international law have created a need for new approaches. See, D Preshova, (n) 680 [5]. For more on the effect of globalization on the application of international law, see also, A Peters, (2007) in JE Nijman and A NollKaemper, *New Perspectives on the Divide Between National and International Law* (Oxford University Press Oxford 2007) 252-254.

<sup>688</sup> Sir Hersch Lauterpatch expressed himself on the relationship between international and domestic law as follows: “[T]he self-evident principle of international law is that a State cannot invoke its municipal law as a reason for non-fulfilment of its international obligations.” See, H Lauterpatch, *The Development of International Law by the International Court* (Cambridge University Press Cambridge 1982) 262.

<sup>689</sup> G. de Burca and O Gerstenberg, “The Denationalization of Constitutional Law” (2006) 47 *Harvard International Law Journal* 245.

<sup>690</sup> A NollKaemper, “The Duality of the Direct Effect of International Law” (2014) 25(1) *EJIL* 105-125, at 105.

<sup>691</sup> *ibid*, 108.

<sup>692</sup> *ibid*.

<sup>693</sup> *ibid*, 112.

Direct effect as a sword serves two principal functions. Firstly, it supplies the domestic sphere with hitherto unlegislated rights and obligations.<sup>694</sup> Secondly, it strengthens the powers of municipal courts, which would otherwise be under the legislative control of political organs of the state.<sup>695</sup> In essence, domestic courts are empowered with the flexibility of thinking outside the box or confines of domestic law-making processes and their restrictive provisions.

As a shield, direct effect can provide a reason for domestic courts to circumvent statutory or other normative reasons, which would have otherwise restricted the application of international law. An example would be where the criteria set in domestic laws or constitutions is not met.<sup>696</sup> Further, in view of other barriers, such as the need for domestication in a dualist state, direct effect offers supremacy to international law, thereby avoiding such dualist requirements of domestic laws. It offers a convenient opening for avoidance of such restrictions.<sup>697</sup>

#### **4.2.2.2.3 Supremacy and Direct Effect: Lessons from the EU Integration**

EU law is supreme over national laws and even constitutions of member states. Accordingly, where there is conflict between European Community law and national law, European Community law shall prevail. This principle has been underscored by the CJEU in a long line of decisions since its first pronouncement on the subject in the *Van Gen den Loos* case in 1963.<sup>698</sup>

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<sup>694</sup> Ginsburg, “Locking in Democracy: Constitutions, Commitment, and International Law” (2010) 38 *NYU J Int’L & Policy*, 707. See also, A Cassese, “Modern Constitutions and International Law” (1985) 192 *Journal of Review of Development Change* 331.

<sup>695</sup> Benvenisti and Downs, “National Courts, Domestic Democracy, and the Evolution of International law” (2009) 20 *European Journal of International Law* 59. See also, Vereschestin, “New Constitutions and the Old Problem of the Relationship between International Law and National Law” (1996) 7 *European Journal of International Law* 29.

<sup>696</sup> Prinssen and A Schrauwen (ed) *Direct Effect: Rethinking the Classical EC Legal Doctrine* (Europa Law Publishing Amsterdam 2002) 129. See also, A NollKaemper, *National Courts and the International Rule of Law* (Oxford University Press Oxford 2011) 130.

<sup>697</sup> Morgenstern, “Judicial Practice and the Supremacy of International Law” (1950) 27 *British Yearbook of International Law*, 42; Klabbbers, “International Law in Community Law: The Law and Politics of Direct Effect” (2002) 21 *British Yearbook of International Law* 263.

<sup>698</sup> R Arigho, “The Supremacy of European Union Law: An Inevitable Revolution or Federation in Action?” (2014) *Journal of Post Graduate Research*, Trinity College Dublin, 7-23, at 8



The EU, which the AEC aspires to emulate<sup>699</sup>, has developed a body of law known as the European Community law.<sup>700</sup> This law applies across all EU member states. The CJEU is tasked with the responsibility of ensuring that European Community law is uniformly applied across the EU membership.<sup>701</sup> The CJEU is also mandated to interpret and apply EU law.<sup>702</sup> Although national courts of EU member states are free to interpret and/or apply the community law, the ultimate jurisdiction to interpret and apply EU law, where there is uncertainty or inconsistency, rests with the CJEU.<sup>703</sup> The CJEU's role in the European integration is to ensure the uniform, just and consistent application of EU Community Law.<sup>704</sup>

Arigho summarises the role of the CJEU as strengthening the community, increasing the scope and effectiveness of community law, and enlarging the powers of community institutions.<sup>705</sup> This, the Court achieves by identifying and establishing the principles of supremacy and direct effect.

Because of the two doctrines of supremacy and direct effect, Nyikos observes that community law started to be accessible to the ordinary citizen for whom it was all along meant.<sup>706</sup> As Rasmussen further observes, the Court achieved the possibility of reaching national audiences of decision makers free of usual governmental political jargon and bureaucracy.<sup>707</sup>

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<sup>699</sup> By the creation of an African Economic Community under the AEC Treaty.

<sup>700</sup> This refers to the body of law constituted in the EU treaties, Protocols, status and pronouncements of the EU Courts.

<sup>701</sup> This role was first spelt out in Article 31 of the Treaty of Paris which established the ECSC. It provided for the jurisdiction of the then European Court of Justice to ensure the interpretation and application of the Treaty, implementation thereof and observance of the law.

<sup>702</sup> Article 4 of the Treaty of Rome signed in 1957 officially recognised the CJEU as an institution of the EU <[http://data.europa.eu/eli/treaty/teu\\_2016/art\\_19/oj](http://data.europa.eu/eli/treaty/teu_2016/art_19/oj)> accessed on 22<sup>nd</sup> September 2019.

<sup>703</sup> Article 19 of the Treaty of Rome.

<sup>704</sup> M Kallestrup, "European Court of Justice be seen as a pro-integration Institution?" (2009) 10 *ECTS* 3.

<sup>705</sup> R Arigho, (n) 698, 9. According to Green, political integration means legal integration. AW Green, "Political Integration by Jurisprudence: The Role of the Court of Justice of European Community in European Political Integration" (Leyden Amsterdam Nijhoff 1996) 9-26, 21.

<sup>706</sup> SA Nyikos, "S.A. Courts" in Grazino and Paolo and Maasten Vink (ed), *Europeanization: New Research Agendas* (Palgrave Macmillan Basingstoke 2007) 182-194, 184.

<sup>707</sup> H Rasmussen, *European Court of Justice Copenhagen: Gadjura, Thomas Information* (1998) 127-169, 128.

Alter notes that supremacy of the EU law, and decision of the CJEU, flows, logically, from the doctrine of direct effect.<sup>708</sup> He adds that for individuals' rights to have any meaning, EU law need to be supreme to the national law, otherwise member states would be able to simply avoid their obligations by creating new national rules or laws.<sup>709</sup>

#### **4.2.2.2.4 Africa's Experiments with Supremacy and Direct Effect**

The AEC, through the AU legislative organs and decisions of the ACJ&HR, will have to develop its own body of community law. After all, the doctrines of Supremacy of EU law and direct effect were not established in any protocols or treaties, but emerged following creative and teleological reasoning of the CJEU in light of the purpose of, rather than a literal reading, of EU laws.<sup>710</sup> Raworth underscores that judicial organs play an influential role in the integration process through developing concepts and principles which are essential for the furtherance and solidification of the integration process.<sup>711</sup> Fagbayibo sees the ACJ&HR as having the potential of fast-tracking closer integration by making judicial pronouncements on issues which may not go down well with member states.<sup>712</sup>

According to Weiler, the supranational status of an international organisation is determined by the existence of both decisional and normative supranationalism within its institutional framework.<sup>713</sup> The quality of the supranational status of an international organisation is determined,

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<sup>708</sup> K Alter, "Establishing the Supremacy of European law" (2001) *New York: Oxford University Press*, 1-63, at 18.

<sup>709</sup> *ibid.*

<sup>710</sup> S Enchelmaier, "Supremacy and Direct effect of European Community Law Reconsidered, or the use and Abuse of Political Science for Jurisprudence" (2010) 23(2) *Oxford Journal of Legal Studies*, 281-299, at 281.

<sup>711</sup> P Raworth, *Introduction to the Legal System of the European Union* (Oxford University Press Oxford 2001) at 84.

<sup>712</sup> B Fagbayibo, (n) 114 above, at 498.

<sup>713</sup> J Weiler, "The Community System: The Dual Character of Supranationalism" (1981) *Yearbook of European Law* 271-281. *ibid.* Fagbayibo adds that in the African continental integration context, this would imply acts such as the ratification and compliance with the Constitutive Act of the AU, African Peer Review Mechanism (APRM), the New Partnership for Africa's Development (NEPAD), and the Pan African Parliament Protocol (PAP). B Fagbayibo, (n) 114 above, at 498.

to a large extent, by the measure of sovereignty that has been transferred to such an organisation by its member states.<sup>714</sup>

Examples are also abounding on the African continent, mainly in the sub-regional context, with regards to efforts at supremacy and direct effect of decisions of its regional courts and/or tribunals. The OHADA Uniform Acts apply to all member states without requiring their domestication.<sup>715</sup> The decisions of the OHADA CCJA have a direct effect on member states and are directly enforced without adoption by national courts.<sup>716</sup> The OHADA CCJA has appellate jurisdiction from national supreme (highest) courts on all matters regarding OHADA laws.<sup>717</sup> The OHADA CCJA also possesses both original and residual jurisdiction to interpret and apply OHADA laws when moved by either an individual (juristic or natural) or a state party.<sup>718</sup>

While the OHADA experience illustrates the effect of supremacy and direct effect in deepening economic integration, other sub-regional RECs do not espouse the supremacy and direct effect principles. For example, the EACJ, the judicial organ of the EAC, does not possess exclusive jurisdiction on EAC Treaty matters, but shares this role with national courts.<sup>719</sup> However, the EACJ's decisions on the interpretation of the EAC Treaty override decisions of national Courts.<sup>720</sup>

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<sup>714</sup>ibid, 499. Hay explains the relationship between supranationalism and sovereignty by remarking that "the concept of a transfer of sovereignty may be the legal-analytic counterpart of a political-descriptive notion of supranationalism". See, P Hay, *Federalism and Supranational Organisations: Patterns for New Legal Structures* (Urbana: Illinois Press 1966) 69.

<sup>715</sup> The direct effect of the OHADA uniform Acts is spelt out in Article 9 of the OHADA Treaty. The Acts come into direct effect in Member States, 30 days after their publication in the OHADA official Journal.

<sup>716</sup> Article 18 of the OHADA Treaty underscore the Court's supremacy over national Courts.

<sup>717</sup> Article 14 of the OHADA Treaty underscores the CCJA and OHADA laws' supremacy over national laws and Courts of Member States.

<sup>718</sup>ibid.

<sup>719</sup>Article 33 of the EAC Treaty recognises the Jurisdiction of national courts to interpret and apply provisions of the treaty.

<sup>720</sup>Article 33 of the EAC Treaty provides that decisions of the EACJ on the interpretation of the EAC Treaty take precedence over those of national courts on similar subject matter. Article 34 directs national courts or tribunals to refer a matter to the EACJ if it considers that a ruling on interpretation and application of the EAC Treaty is necessary to enable the national court to give a judgment.

In fact, the EACJ has held that it does not possess appellate or supreme powers over decisions of national constitutional or supreme courts of member states.<sup>721</sup> The COMESA Court has similarly held that it does not possess appellate or supervisory authority over national courts of member states.<sup>722</sup>

While the architects of the General Section of the ACJ&HR modelled it along the General Court of the CJEU, it seems to have been lost on them that the context of economic integration in Africa takes a significantly different complexion. The EU does not have to contend with sub-regional economic communities, each with different objectives and stages of integration. The result is that a dispute resolution mechanism that does not take into account the many RECs and their own unique dispute settlement systems is difficult to conceive and ultimately achieve. Problems of choice of forum and forum-shopping are bound to arise, particularly since the sub-regional RECs have to exist side by side with the AEC, AfCFTA and TFTA, which all have a unique dispute resolution mechanism that address trade and investment issues.<sup>723</sup>

At the continental level, the AfCFTA Dispute Settlement Body will have to contend with overlapping jurisdictional questions with the ACJ&HR on matters relating to economic integration. Yet, this can be avoided by providing a continental overarching dispute resolution mechanism that transcends all the fragmented RECs in Africa.

Another challenge in attaining supranational status for continental integration organs, including courts, is the reluctance by states to cede judicial or political sovereignty. A healthy but delicate balance has to be struck. For example, Fagbayibo observes that supranational legal and

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<sup>721</sup> In the case of *East African Civil Society Organisation Forum v The Attorney General of the Republic of Burundi & 2 others* Ref No. 2 of 2015, the EACJ held that the Court has no jurisdiction to revise, review or quash a decision of the constitutional Court of a Partner state. <<http://eacj.eac.int/?cases=the-east-africa-civil-society-organisations-forum-eacsof-vs-the-attorney-general-of-burundi-2-others>.> accessed on 10<sup>th</sup> October 2018.

<sup>722</sup> In *Malawi Mobile Ltd v Government of Malawi and Malawi Communications Regulatory Authority* Appeal Number 1 of 2016. The COMESA Court of Justice held that it was not a supranational court with a mandate to control the legality of every national act of a member state, unrelated to the COMESA Treaty.

<sup>723</sup> The Judicial Organs of the regional RECs have been discussed in detail in Chapter 2 of this work. It is not worthy to observe that the problem of overlapping Jurisdiction between the ACJ&HR and REC judicial organs is also addressed. Chapter 5 of this thesis lays a basis for consolidating and devolving the ACJ&HR Court structure to the sub-regions.

political entities serve the crucial role of safeguarding member state's interests, by ensuring that a healthy balance is struck between the sovereignty of supranational international entities and national interests.<sup>724</sup> He reckons that clothing AU institutions with sovereign attributes will not be easy. However, with calculated steps, tactful negotiations, constant assurances and compromises, this is still a possibility.<sup>725</sup>

The attitude of most African leaders towards ceding sovereignty has been described as lackadaisical.<sup>726</sup> Udombana's analysis is a harsh indictment of the attitude of most African states to integration:<sup>727</sup>

African leaders lack the certitude to face the challenges of integration. Integration requires that each constituent party have clearly defined national plan and strategies to achieve economic development. Like a child in a toyshop, most leaders in Africa do not know which way to look. They have been unable to make the changes that will sustain growth and development. Others are not prepared to subordinate immediate national plans to long term economic regional goals or to cede essential elements of sovereignty to regional institutions.

The partial loss or sharing of sovereignty between national courts and a supranational judicial organ should not be the reason for state parties to undermine the integration effort but should instead encourage the process. The key reason for state members' reluctance to cede sovereignty is largely due to the adversarial focus in international negotiations, with one side losing for the other to gain, and not a win-win result. MacCormick suggests, using an interesting analogy, a pragmatic, win-win mentality approach.<sup>728</sup>

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<sup>724</sup>B Fagbayibo, (n) 114, at 500.

<sup>725</sup>*ibid.*

<sup>726</sup>*ibid.*

<sup>727</sup>Udombana, "A Harmony or Cacophony? The Music of Integration in the African Union Treaty and The New Partnership for Africa's Development" (2002) *Indiana International and Comparative Law Review* 202.

<sup>728</sup>MacCormick, "Beyond the Sovereign State" (1993) *The Modern Law Review* 16.

We must not envisage sovereignty as the object of some kind of zero sum game, such that the moment X loses it, Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it.

#### **4.2.2.3 The Preliminary Ruling Procedure**

The preliminary ruling procedure was first established in Article 177 of the now defunct European Community (EC), and was renumbered, following the Amsterdam Treaty, to Article 234.<sup>729</sup> The procedure provides that national courts or tribunals can request for a preliminary ruling from the CJEU in cases where the following are in issue:

- the interpretation of the Treaty;
- the validity or interpretation of the acts of the community institutions;
- the interpretation of the statutes of bodies created by the council, where those statutes so provide.

The preliminary procedure is available before the national court delivers a final Judgment in a particular case. This intervention is available to national courts and is described in various ways by REC instruments across the world.<sup>730</sup> National courts of the highest level, from whose

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<sup>729</sup>K Alter, *Establishing the Supremacy of European law* (New York Oxford University Press New York 2001) 1-63, at 9.

<sup>730</sup>T Kennedy, “The European Court of Justice” in J Peterson and M Shackleton, *The Institutions of the European Union* (Oxford University Press Oxford 2006) 125- 45, at 133. The preliminary procedure is also referred to in other international integration systems, for example under Article 22 of the Statute of the Court of the Central American Court of Justice (CACJ), as “pre-judicial consultations”; the juridical effect of this procedure is similar to the preliminary ruling procedure, the intention being to ensure uniformity and compliance with the principles of the Central American integration system. See, SM Joridson, “The Central American Court of Justice: Yesterday, Today and Tomorrow?” (2009) 25 *Connecticut Journal of International Law*, 183. The Caribbean Court of Justice’s rules on preliminary ruling jurisdiction are found in identical provisions in the Caribbean Community (CARICOM) Treaty, Articles 211 (1) (c), 211(2) and 214 of the CARICOM Treaty and articles XII(1)(c), XII (2) and XIV of the Agreement Establishing the Caribbean Court of Justice. These provisions obligate all domestic courts or tribunals of member states to seek a preliminary ruling in relation to the interpretation or application of CARICOM law. See, A McDonald “The Caribbean Court of Justice: Enhancing the law of International Organisations” (2004) 27 *Fordham International*

judgment no right of appeal lies, are obliged to submit the question for preliminary ruling, when the case before it raises questions concerning European Community law.<sup>731</sup> The effect of the preliminary ruling is that it is binding on national courts from which it is sought.<sup>732</sup> It also leads to real and fruitful collaboration between the municipal courts and the CJEU.<sup>733</sup>

To give effect to its supremacy, besides direct effect, EU law employs two principles of supranationalism. The first is through pre-emptive legislation, which binds the member states not to enact law that contradict EU laws.<sup>734</sup> The second principle is through the preliminary ruling procedure of the CJEU.<sup>735</sup>

#### **4.2.2.3.1 Contribution of the Preliminary Procedure to the Integration Process**

The preliminary ruling procedure is concerned with the interaction and cooperation between international and national courts. The use of the preliminary ruling procedure by international courts and tribunals has had at least two advantages in the EU. According to Kennedy, the use of the preliminary ruling procedure does not invite a contest or competition between the CJEU and

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*Law Journal* at 930. See also, D O'Brien and S Morano-Foadi, "The Caribbean Court of Justice and Legal Integration within CARICOM" (2009) 8 *LPICIT* 399.

<sup>731</sup>MA Pollack, *The Engines of European Integration* (Oxford University Press New York 2003) 155-203, at 162.

<sup>732</sup>*Arsenal v Reed*, case number 206 /2002, *European Court Reports* 2002 I-10273 <<https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:62001CC0206>> accessed on 23<sup>rd</sup> September 2019.

<sup>733</sup>*De Geus*, case number 13/1961. ECLI:EU:C: 1962:11.

<<https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A61961CJ0013>> accessed on 23<sup>rd</sup> September 2019.

<sup>734</sup>Case C – 26/1962 *Van Gend Loos* (1963) E.C.R 1; *Costa v ENEL* Case C-6/64 (1964) E.C.R 585 and *Delo Stato v Simmenthal SpA* (1978) E.C.R 629. The Court emphasised that the supremacy of EU law goes beyond the constituency of member states. EU law is therefore the grand norm of members' states. See generally, DR Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall sweet and Maxwell Dublin 1997).

<sup>735</sup>The Three approaches have been christened the magic triangle of "direct effect", "supremacy" and "preliminary ruling" A Vauchez, "Integration-through law: Contribution to socio-history of EU Political Common-sense" (2008) *EUI Working Papers*, 10. On how the EU legal system and laws have shaped and influenced integration, see also, R Byberg, "The History of Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe" (2017) 18(6) *German Law Journal* 1531-1556

national Courts, but instead creates cooperation.<sup>736</sup> Moreover, national courts become allies of the CJEU in extending the scope of EU law, which in turn deepens the integration process.<sup>737</sup>

Arnulf describes Article 234 of the Amsterdam Treaty as “a stroke of genius”.<sup>738</sup> Craig and De Burca call it “the jewel in the crown” of European integration.<sup>739</sup> In its decision in the case of *Rheinmütten*<sup>740</sup>, the CJEU held that Article 234 is essential for the preservation of the community character of law established by the treaty and has the object of ensuring that in all circumstances, the law is the same in all the states of the community. The court added that it had a “panoramic view” of the Community and its law, and hence is best placed to ensure uniformity in its application and observance through its exercise of its preliminary procedure jurisdiction.<sup>741</sup>

Virzo writes that the CJEU has moulded many principles that have had a significant impact on the development of the EU integration process, and the use of the preliminary ruling procedure is one such notable principle.<sup>742</sup> The success of the preliminary ruling procedure in the EU integration process has largely been attributed to its role in enabling the CJEU to engage in cooperation, rather than competition, with national courts of member states.<sup>743</sup> This has led to a healthy “dialogue” between the two courts, which discourse has shaped the Union’s legal System.<sup>744</sup> Arnulf sees the relationship between the CJEU and the referring national court as cooperative rather than hierarchical, with proceedings taking the form of a dialogue or conversation in which the two courts jointly seek a solution to the case at hand in harmony with

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<sup>736</sup>T Kennedy, (n) 730, 133.

<sup>737</sup>*ibid.*

<sup>738</sup>A Arnulf, *The European Union and its Court of Justice* (Oxford University Press, Oxford 2006) 96.

<sup>739</sup>P Craig and G De Burca, *EU Law: Text, Cases and Materials* (6<sup>th</sup> ed. Oxford University Press: Oxford 2015)

<sup>740</sup> *Rheinmütten-Dusseldorf* (1974) [4].

<sup>741</sup>*ibid.*

<sup>742</sup> This is alongside the principles of Direct effect and Supremacy. R Virzo, *The Preliminary Ruling Procedures at the International Regional Courts and Tribunals* (Martinus Nijhoff Publishers Amsterdam 2011) 285-313, at 285.

<sup>743</sup>*ibid.*, at 286.

<sup>744</sup> Opinion of the Advocate General Ruiz-Jarabo Colomer in Case C-205/08 *Umweltanwalt von Karnten and Alpe Adria Energia SpA* (25 June 2009), [30].



the requirements of Community law.<sup>745</sup> The uniformity of interpretation, and hence application, of EU norms throughout the Union, is the direct product of use of the procedure.<sup>746</sup>

The requirement for exhaustion of local remedies and the principle of subsidiarity limit the scope of application of the preliminary ruling procedure. The complementary jurisdiction of the CJEU with national courts on matters regarding the interpretation and application of EU law has led to the emergence and hence requirement, which parties must first exhaust local or domestic remedies/mechanisms before approaching the CJEU.<sup>747</sup> The doctrine of subsidiarity, on the other hand, implies that international organisations should only deal with matters that cannot be sufficiently handled at the domestic level.<sup>748</sup>

#### ***4.2.2.3.2 Use of the Preliminary Ruling Procedure by African Sub-Regional Courts***

The preliminary ruling procedure is provided for in the jurisdiction of the regional courts of SADC, COMESA, EAC, UEMOA, CEMAC and OHADA. There is, however, a distinction in terms of the approach employed. ECOWAS seems to provide a non-mandatory or optional approach, while the others prefer a more stringent and compulsory approach. The difference is even more apparent when one looks at the consequences of failure to make the reference.

Article 10 (f) of the Protocol on the Community Court of Justice of the ECOWAS provides that domestic courts that wish to exercise that option may seek a preliminary ruling to the Court of Justice provided that the question concerns the interpretation of the ECOWAS Treaty, its protocols and secondary laws. The wording of this Article is clearly couched in permissive terms that leaves the discretion or choice of referring preliminary questions to the national court concern.<sup>749</sup>

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<sup>745</sup>A Arnall, *The European Union and its Court of Justice* (2<sup>nd</sup> Edition, Oxford University Press, Oxford 2003) 96.

<sup>746</sup>R Virzo, (n)742, 286.

<sup>747</sup>CF Amerasinghe, “Whither the local Remedies Rule” (1990) 5(1) *Foreign Investment Law Journal* 292-310, 293.

<sup>748</sup>A Dashwood, *European Union Law* (Hart Publishers Oxford 2000) 158-159.

<sup>749</sup>See AO Enabulele, “Reflections on the ECOWAS Community Court Protocol and Constitutions of Member States” (2010) 12 *International Community Law Review* 111. See also, O Karin and A Zimmerman (eds), *Dispute Settlement in Public International Law* (2<sup>nd</sup> ed Springer Berlin 2001) 1022.

Article 16 of the SADC Tribunal Protocol provides that all domestic courts and tribunals are under an obligation to make the preliminary reference on matters of interpretation and application of the SADC law, including the Treaty, protocols, statutes and other laws. However, the SADC Tribunal is precluded from ruling on the merits of the case pending before the referring domestic court.

Domestic or national courts and tribunals of the EAC, COMESA, UEMOA and CEMAC member states must, on questions of interpretation, applicability and validity of domestic laws vis-a-vis regional law, seek a preliminary ruling from respective regional courts.<sup>750</sup> These RECs apply a mandatory approach to the use of the preliminary reference process.

As noted above, the difference between non-compulsory and mandatory approaches is in the consequences of failing to refer. The mandatory approach entails the possibility of the failure triggering infringement proceedings. The basis of this is that failure to refer, in accordance to a treaty or protocol is, *strictu sensu*, a breach of the treaty obligations of a member state and could trigger treaty infringement proceedings. Mackenzie, Romano, Shany and Sands observe that the failure of a national court, which is a court of last resort, to request a preliminary ruling from the regional tribunal might be considered a violation of due process, which could render null and void the judgement of the national court.<sup>751</sup> For example, Article 29 of the EAC Treaty, and Article 25 of the COMESA Treaty, whose terms are almost identical, provide for institution of infringement proceedings by the respective Secretary-Generals of the organisations upon failure to resolve the matter by the respective Councils of Ministers. A provision identical to Article 14 of the First Protocol to the Treaty establishing UEMOA is found in Article 19 of the Treaty of Libreville regarding the CEMAC Court of Justice. These provisions envisage sanctions for breach of the obligation to seek a preliminary ruling.

The use of the preliminary ruling procedure in Africa is not without resistance. The first problem revolves around the relations between national courts and regional courts with respect to supremacy and the jealous exercise of sovereignty by national courts. National courts often view

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<sup>750</sup> Article 29 of the EAC Treaty; Article 25 of the COMESA Treaty; Article 14 of the UEMOA Treaty; and Article 19 of the CEMAC Treaty.

<sup>751</sup> C Mackenzie and CPR Roman and Y Shany and PJ Sand, *The Manual on International Courts and Tribunals* (2nd ed. Oxford University Press Oxford 2010) 296.

the role of regional courts, with respect to the use of the preliminary procedure, as being intrusive and a condescending undermining of their sovereignty.<sup>752</sup> For example, the Zimbabwean Supreme Court, in *Gramara and Bailie Cloete v Republic of Zimbabwe*<sup>753</sup>, stated that as a matter of public policy of Zimbabwe, decisions of international and foreign courts are construed as being capable of being recognised, invoked and enforced in Zimbabwe, only if they do not conflict with Zimbabwe's constitution.

The other challenge that arises is one of multiplicity of membership to RECs, a common feature in Africa.<sup>754</sup> The relationship between UEMOA, CEMAC and OHADA is another interesting source of conflict in this regard. All UEMOA and CEMAC members are also members of OHADA. This means that proceedings before a domestic court of a member state could raise questions as to the interpretation or application of UEMOA or CEMAC law on the one hand and the interpretation or application of OHADA law on the other hand.<sup>755</sup>

OHADA has developed an elaborate procedure for ensuring uniform interpretation of OHADA laws. Articles 14-20 of the OHADA Treaty are instructive in this regard. These include: the direct effect of OHADA Uniform Acts; express provision on supremacy of the OHADA CCJA over national courts of member states (including supreme and constitutional courts); determining appeals; and taking over matters from national courts and assuming jurisdiction with respect to interpretation and application of OHADA laws.<sup>756</sup> Even such an elaborate system has not deterred national courts from declining to give effect to the reference procedure. In its judgement in the case of *Snar Leyma v Hima Souley*,<sup>757</sup> the Supreme Court of Niger, a state member of the OHADA,

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<sup>752</sup> See, R Virzo, (n) 742, 294-295.

<sup>753</sup> HH 169-2009, HC 33/09 <<http://www.veritaszim.net/node/327>> accessed on 28<sup>th</sup> October 2018.

<sup>754</sup> African states are members of at least 6 RECs, most with overlapping objectives, leading to the phenomenon known as the "spaghetti bowl" problem. This phenomenon and its effect on continental trade and investment dispute resolution on the continent is discussed in next Chapter of this thesis at 5.3.1.

<sup>755</sup> R Kamto, "The Courts of Justice of Communities and African Economic Integration Organisations" (1998) 6<sup>th</sup> *Yearbook of International Law*, 107, 147-150. See also, Y Shany, "Regulating Jurisdictional Relations between National and International Courts" (Oxford University Press Oxford 2007).

<sup>756</sup> Articles 14-20 of the OHADA Treaty.

<sup>757</sup> Niger Supreme Court Judgement in case 01-158/C. <<http://www.ohada.com/jurisprudence/ohadata/J-02-28.html>> accessed on 28<sup>th</sup> October 2018. Also quoted in Virzo, (n)742, 295.

ruled that it did not need to refer the annulment proceedings before it to the CCJA. The Court's reasoning was that while the case raised issues concerning an OHADA Act, it was based mainly on the grounds that the appealed judgement violated the rule governing the Niger code of civil procedure.<sup>758</sup>

#### **4.2.2.3.3 *The Preliminary Ruling Procedure as an Imperative for the ACJ&HR***

Uniformity in the interpretation and application of community law is critical for a well-functioning economic integration effort.<sup>759</sup> The Protocol and Statute of the ACJ&HR does not provide for the supremacy of the Court over national or sub-regional courts and tribunals. The Court's decisions do not have a direct effect/application in the sub-region or member states. Instead, national and sub-regional courts have complementary jurisdiction to the ACJ&HR.

The enforcement of the ACJ&HR's decisions is largely an intergovernmental affair relying on the good will of the member states to give it effect.<sup>760</sup> The ACJ&HR possess neither exclusive jurisdiction nor preliminary ruling jurisdiction on questions of interpretation and application of AU statutes and laws.<sup>761</sup> In other words, there is no requirement on the part of the AU member states or their national courts to refer questions on AU law to the ACJ&HR. There is also no way of ensuring uniform application, by member states, of AU laws since the AU single Court is not the last court of resort on such matters.

The state of affairs obtaining in Africa is that various national/domestic and regional court systems operate, at the same time, undertaking the function of interpretation and application of the law of RECs. This multifarious approach raises a risk of a conflict of judgements and an uneven application of the African Economic Community law within member states. This can ultimately compromise attainment of the lofty goal of economic integration of the continent. This situation is made worse by the multiplicity of RECs in Africa with an overlapping membership, objectives

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<sup>758</sup> R Virzo, *ibid.*

<sup>759</sup> JT Gathii, "African Regional Trade Agreements as Flexible Legal Regimes" (2010) 35 *North Carolina Journal of International Law and Commercial Regulation*, 608-641. See also, P Van der Mei, "Regional Integration: The Contribution of the Court of Justice of the East African Community" (2009) *ZaoRV* 69.

<sup>760</sup> Article 49 of the Statute of the ACJ&HR.

<sup>761</sup> See Articles 26 and 46 of the Statute of the ACJ&HR; there is no mention in both the Statute and the Amendment Protocol of either the *Direct Effect* or the *Preliminary Ruling* jurisdiction.

and jurisdiction of its judicial organs. It is important that in the context of the economic integration of the continent under the aegis of the AEC, the various domestic/national systems and RECs delegate or cede this jurisdiction to an overarching continental judicial authority.

The preliminary ruling procedure is not a perfect panacea to the problems that afflict the uniform application of international law; and sometimes, if not properly employed, may lead to delays in determining cases pending before national courts and friction between the international and domestic courts.<sup>762</sup> It, however, presents, so far, the most effective approach to ensuring the uniform application of international or regional norms.<sup>763</sup>

#### **4.2.3 Jurisdiction *Personae* and Direct Access to the ACJ&HR by Individuals**

The concept of Jurisdiction *personae* determines who has the competence to bring cases and actions before the Court. Articles 29 and 30 of the Statute of the ACJ&HR replicate the provisions of jurisdiction *personae* from the now defunct Protocol on the African Court of Justice.<sup>764</sup> The provisions entitle state parties, the Assembly, Parliament and other organs of the union, authorised by the Assembly, to submit any case to the Court on any issue or dispute provided for in Article 28. A staff member of the AU Commission is also entitled to file an appeal with the Court regarding a dispute, in accordance with the staff Rules and Regulations of the AU.<sup>765</sup>

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<sup>762</sup> See, CJEU Papers “The Future of the Judicial System of the European Union” (May 1999)

<<http://www.alanuzelac.from.hr/Pdf/eu-postdip/Buducnost%20suda%20Europskih%20zajednica%20-%20ave.pdf>> accessed on 23<sup>rd</sup> September 2018, 12-13, See also, the Due Report January 2000 (CJUE Papers) “The Future of the European Community Court System” <<http://www.curia.europa.eu/jcms/jcms>> accessed on 23<sup>rd</sup> September 2019.

<sup>763</sup> See the critique of the preliminary ruling procedure by E David, “Preliminary Reference Procedure: Constraints and Remedies” (1999) <<https://www.law.du.edu/documents/judge-david-edward-oral-history/1999-the-preliminary.pdf>> accessed on 30<sup>th</sup> October 2018.

<sup>764</sup> Article 29 seems to be connected with the General Section while Article 130 is connected with the Human Rights jurisdiction. See also, M Evans and R Murray (ed), *The African Charter on Human and People’ Rights. The System in Practice 1986-2006*, (Cambridge University Press, Cambridge 2008) 1; Articles 28 and 28 of the Statute of ACJ&HR are substantively similar to Article 19 of the now defunct Protocol on the African Court of Justice.

<sup>765</sup> Article 29 (1).

#### **4.2.3.1 Absence of Direct Access by Individuals to the General Section of the ACJ&HR**

The human rights and international criminal law jurisdictions of the Court are quite elaborately set out in Articles 28A (1) of the Court's Statute. Individual's access of the International Criminal Law section of the Court is assured even in more elaborate terms by the Court's amendment protocol.<sup>766</sup> However, there is a glaring absence of similar provisions for the General Section of the Court. Neither the Statute nor the amendment Protocol provides for, nor addresses, the right of the individuals to move the Court. Under Article 29 of the Statute of the ACJ&HR, only state parties have an express right to file cases before the General Section of the Court. It, therefore, follows that trade and investment justice at the ACJ&HRs is the preserve of state parties, and is purely an intergovernmental affair.

The principal objective of the AEC is to deepen economic integration of the continent by growth of intra Africa trade. Most trade transactions involve the private sector (as producers or traders in goods, providers of services and as investors).<sup>767</sup> This, therefore, requires that legal remedies for the private sector be accommodated to ensure efficient outcomes and optimal practices.<sup>768</sup> The current approach to international dispute settlement means that an aggrieved investor will only be protected if his state of nationality acts on his behalf when trade agreements are violated.<sup>769</sup> Under this classical approach to international dispute resolution, only state parties to an integration agreement or treaty have access to the dispute settlement mechanism established thereunder.<sup>770</sup> This approach, according to Erasmus, only made sense when the sovereign equality of states dominated the governmental relations.<sup>771</sup> This approach, however, has been found to be unsuitable in addressing contemporary needs and realities of globalisation.<sup>772</sup>

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<sup>766</sup>Article 30 (f) of the Statute of the ACJ&HR, limits individual's access to the court cases regarding violation of human rights guaranteed by the African Charter, Charter on Rights and Welfare of the child, the protocol to the African Charter on Human and People's Rights of women in Africa and other legal instruments relevant to Human rights ratified by State Parties concerned.

<sup>767</sup>G Erasmus, (n) 276, 4.

<sup>768</sup>*ibid.*

<sup>769</sup>*ibid.*

<sup>770</sup>*ibid.*, 3.

<sup>771</sup>*ibid.*

<sup>772</sup>*ibid.*

The current situation availed by Article 29 of the Statute of the ACJ&HR portends at least three consequences. Firstly, the Statute permits states to shield themselves from complaints by their own citizens and foreign investors who allege trade and investment violations. Investors always prefer an international investment system because of the perceived states of national or domestic judicial systems, particularly in state-investor disputes.

Secondly, the absence of an individual's access to the Court in trade and investment related disputes, renders access to justice by investors and traders illusory and is a significant set-back to progressive strides made by sub-regional mechanisms. Sub-regional dispute resolution mechanisms such as the EAC, SADC and OHADA have either expressly provided for access by individuals to their disputes resolution bodies or have evolved jurisprudence that had permitted such access.<sup>773</sup> It would be a drawback to these sub-regional advancements in denying individuals access to trade and investment justice at the continental level, when sub-regional systems have already advanced to granting this right. This is significant, noting that continental economic integration is supposed to build upon the developments already made at sub-regional REC levels.<sup>774</sup>

Saurombe offers insights into why African RECs are generally averse to participation in REC affairs and decision-making process by other persons except for state parties.<sup>775</sup> He opines that REC organs treat Non-Governmental Organisations (NGOs) and civil society groups as members of opposition political parties whose views are either disruptive or antithetical to its objectives.<sup>776</sup> Most of these organisations question member states' adherence to the rule of law, human rights standards set out in REC treaties and protocols, and democratic ideals. This makes them unpopular to many African states. In fact, most African States have adopted democratic

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<sup>773</sup>Article 30 of the EAC Treaty of 1999 permits on individual to move the EACJ; the OHADA Treaty incorporates upon adoption of uniform laws, the same into national laws of the member states, and both natural and juridical persons can access the Court. The SADC tribunal has pronounced itself on this aspect in the *Mike Campbell Case*; Article 9 and 10 of the ECOWAS Treaty allows limited access to the Court by individuals in matters relating to human rights violation. Article 26 of the COMESA Treaty permits both natural and juridical persons resident in a member states to bring an action in the COMESA Court of Justice.

<sup>774</sup>Article 6 of the AEC Treaty. See also Article 3(l) of the AU Constitutive Act.

<sup>775</sup>A Saurombe, (n) 614, 104.

<sup>776</sup>*ibid*.

ideals only on paper and not in practice. Oluwo, for example, is sceptical about most African states implementing shared norms such as democracy, human rights observance, and good governance, which they subscribe to in integration agreements but domestically observe only in breach.<sup>777</sup> Oluwo rhetorically poses:

How then could leaders whose claim to political authority is questionable commit themselves to programmes that would empower the mass of their people? How can such rogue regimes turn around to promote the core principles of rule of law and good governance within their domain?

Thirdly, the limitation to access by individuals to the General Section of the ACJ&HR will eventually undermine the development of African trade and investment governance. As noted above, Africa's trade and investment governance jurisprudence has not significantly grown, as compared to other parts of the world, largely due to the limitations placed on individuals' access to continental and regional dispute resolution mechanisms.<sup>778</sup> Coupled with the fact that African states do not sue each other, the culture of adherence to a rule-based and transparent trade and investment regime is not deeply entrenched in Africa. A change of this culture can only be achieved by evolving a predictable trade and investment regulation that is supported by an efficient trade and investment dispute resolution mechanism. It will also be important to open up trade and investment dispute settlement to both states and individuals. A well-designed continental integration regime will grant both states and private persons, juristic and natural, standing before its dispute resolution organs. Such private parties will then be entitled to remedies when trade agreements are infringed on, and thus suffer the consequences.<sup>779</sup>

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<sup>777</sup> Oluwo, "Regional Integration, Development and the Africa Union Agenda: Challenges, Gaps and Opportunities" (2003) *Transnational International law & Comparative Problems* 39. See also J Gathii, (n) 83, 250.

<sup>778</sup> G Erasmus, note 276, 1.

<sup>779</sup> *ibid*, 4.



#### ***4.2.4 Advisory Jurisdiction of the ACJ&HR***

Article 53 of the Statute of the ACJ&HR confers advisory jurisdiction upon the Court. However, it is only the organs of the AU, such as the Assembly of Heads of State and Government; the Pan-African Parliament; the Executive Council, the Peace and Security Council; the Economic, Social and Cultural Council; the Financial Institutions or such other organs of the AU, as may be authorised by the AU assembly, which can request such advisory opinions. This provision is narrower than that in the Protocol establishing the African Court on Human and Peoples' Rights.<sup>780</sup> Article 4 of the Protocol establishing the now defunct Africa Court on Human and Peoples' Rights permitted the Court to deliver advisory opinions at the request of member states of the OAU, and any of its organs or African organisations recognised by the OAU.

Sub-regional RECs such as the EAC, SADC and ECOWAS have conferred, in their respective establishing treaties, jurisdiction upon their courts and tribunals to render advisory opinions, to both the organs of the RECs and member states.<sup>781</sup> This is an important consideration since the achievement of the AEC primarily rests upon the ability of the AU to coordinate RECs and harness the developments already achieved at the sub-regional REC levels. It cannot, therefore, be progressive for the AU to be seen to be pulling in different directions with RECs, particularly on normative questions of jurisdiction of the ACJ&HR.

Though advisory opinions are not always binding, practice in other economic integration organisations outside Africa has shown that the advisory opinion jurisdiction of regional and sub-regional courts is important in reducing disputes and enhancing integration.<sup>782</sup> Both the EU and

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<sup>780</sup>Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on Establishment of an African Court on Human and Peoples' Rights <<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>> accessed on 5<sup>th</sup> October 2018.

<sup>781</sup> Article 36 of the EAC Treaty; Article 10 of the ECOWAS Court Protocol, Article 4 of the SADC Treaty and Article 32 of the COMESA Treaty.

<sup>782</sup> See the Report on the High Level Conference on the Future of the European Court of Human Rights (2011) "Reflection paper on the proposal to Extend the Court's Advisory Jurisdiction" 1 <[https://www.echr.coe.int/Documents/2013\\_Courts\\_advisory\\_jurisdiction\\_ENG.pdf](https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf)> accessed on 5<sup>th</sup> October 2018. See also, *The Report of the wise men to the committee of the Ministers of 15 November 2006*, (2006) Accessed on 5<sup>th</sup> October 2018.

inter American Courts exercise advisory opinion jurisdiction on the request of EU organs and member states or their courts.<sup>783</sup>

It is, therefore, not clear why the framers of the ACJ&HR have decided to break away from tradition and practice established by other regional courts the world over, and sub-regional courts in Africa. Advisory opinions enable states to approach the Court to test the compatibility of its domestic laws with international or regional law and values.<sup>784</sup> As noted in the foregoing parts of this chapter, African states regard amicable dispute resolution and diplomacy as the better option over litigation, because advisory opinions offer a less confrontational approach to dealing with potential disputes.<sup>785</sup>

#### ***4.2.5 Alternative Dispute Resolution (ADR) and Arbitration Jurisdiction of the ACJ&HR***

African governments prefer diplomatic channels for settling their differences, as opposed to regional or international Courts.<sup>786</sup> African states are, therefore, also not regular or active users of the dispute settlement systems at the World Trade Organisation (WTO).<sup>787</sup> Although there is no evidence that the use of diplomatic channels has always successfully settled disputes between African states, there is evidence that African states do not favour regional institutions with the

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<sup>783</sup>Article 218 of the Treaty of the European Union, provides for the General Court's jurisdiction to issue opinions on application of either the EU organs or a member state: Protocol 2 of 1970 empowered the ECHR to give Advisory opinions. See K Dzehtsiarou and N O'Meara, *Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket Control?* (Cambridge University Press Cambridge 2018) <<https://www.cambridge.org/core/journals/legal-studies/article/advisory-jurisdiction-and-the-european-court-of-human-rights-a-magic-bullet-for-dialogue-and-docketcontrol/E7BDA1704CCB5045CDB47F72C5DFBCB7.>> accessed on 5<sup>th</sup> October 2018. VO Nmehielle, "The African Human Rights System. Its laws, Practice and Institutions. (Martinus publishers The Hague 2001) 272.

<sup>784</sup>*ibid.*

<sup>785</sup> F Viljoen, *International Human Rights in Africa*, (Oxford University Press Oxford 2007) 505.

<sup>786</sup>G Erasmus, *Alternative Dispute Settlement Procedure for Trade-related Disputes in Africa* (2018) <<https://www.tralac.org/blog/article/13527-alternative-dispute-settlement-procedures-for-trade-related-disputes-in-africa.html.>> accessed on 4<sup>th</sup> October 2018, 4. See also, R Simo, (n)611, 4 [3].

<sup>787</sup>*ibid.*, 3.

power to monitor compliance with trade and investment obligations.<sup>788</sup> It has been suggested that this is largely because African nations are reluctant in ceding sovereignty.<sup>789</sup>

International law has developed a body of principles of law known as *Lex Mercatoria* or law merchant, which regulates international investment and international commercial arbitration as one of its main features.<sup>790</sup> International Courts are increasingly incorporating ADR as part of their efforts in resolving trade and investment disputes. This is in recognition of the unique nature of such disputes. Disputes between states are best resolved through a mediated settlement, while state-investor or investor-investor disputes are best settled through arbitration. ADR and particularly arbitration provides disputants with important qualities which are attractive to commercial persons. These include: confidentiality of the process, expeditious settlement of disputes, use of experts as dispute resolvers (persons with skills and knowledge in the specific area of dispute); and finality of the process, since no appeal lies on the merits of an arbitral award.<sup>791</sup> Transnational commercial persons also prefer international arbitration because it assures them of an impartial arbiter free from state influence, particularly in disputes involving states or state organs and foreign investors.<sup>792</sup>

A progressive trade and investment dispute resolution mechanism should, therefore, incorporate an ADR mechanism within its architecture. Unfortunately, the ACJ&HR General Section does not provide for ADR or arbitration. Yet, as noted above, the objective behind the AEC, and the AfCFTA, is to boost intra-African trade.<sup>793</sup> The timeous, efficient and effective settlement of disputes is, therefore, a binding obligation upon all state parties to the AEC Treaty.

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<sup>788</sup>ibid, 4.

<sup>789</sup> R Simo, (n) 611 [10].

<sup>790</sup>H Booysen, "International law as a Legal System: the Quest and the need for a Private – Law Leg" (1996) 21 *South African Yearbook of International Law* 60-72 60. See also, SA Sweet "The New Lex Mercatoria and Transnational Government?" (2006) 13 *Journal of European Public Policy* 627-646, at 627.

<sup>791</sup>J Chaisse, "Investor-State Arbitration in International Tax Dispute Resolution. A cut above Dedicated Tax Dispute Resolution?" (2016) 41(2) *Virginia Law Review* 149-222, at 151-152.

<sup>792</sup>ibid.

<sup>793</sup>G Erasmus, (n) 786, 4.

On the international plane, evidence of widespread use of international commercial arbitration, and other forms of ADR, demonstrates its significance. Although the International Centre for Settlement of Investment Disputes (ICSID) is facing legitimacy challenges lately, its relative success of is living proof of the role of international arbitration in settling state-investor disputes.<sup>794</sup> According to Berger, 90% of all transnational commercial contracts contain arbitration clauses.<sup>795</sup>

In the African region, and its sub-regions, a similar approach providing for ADR has been adopted. Apart from providing elaborate trade remedies and safeguards, the AfCFTA underscores a rule based, transparent and efficient dispute resolution mechanism which includes a Dispute Settlement Body (AB), an Appeals Body (AB) and Arbitration.<sup>796</sup> The AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes also emphasises the role of negotiations, use of good offices, conciliation, mediation and consensus building in settlement of trade disputes between state parties.<sup>797</sup> The EAC, COMESA and ECOWAS have integrated ADR, and particularly arbitration, in their dispute resolution mechanisms.<sup>798</sup>

While Africa seems to favour diplomatic or informal means of settling disputes, these do not always work for all forms of disputes. A certain and predictable dispute settlement system is important, particularly where the private sector is involved. Inter-state disputes are not the only ones to be resolved in international trade. Private commercial transactions also require dispute

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<sup>794</sup>C Schreuer, “Commentary on the ICSID Convention” (1996) 11(2) *Foreign Investment Law Journal*, 318-492, at 1.

<sup>795</sup>K Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer The Hague 1999) 111.

<sup>796</sup> The AfCFTA has taken the WTO model of dispute resolution that provides for ADR Mechanisms. See, Articles 5, 6,7,8,10,21 and 27 of the Protocol on Rules and Procedures on the Settlement of Disputes.

<sup>797</sup> Article 7 and 8 of the AfCFTA Protocol on the Rules and procedures on Settlement of Disputes.

<sup>798</sup> Article 28 of the COMESA Court confers the COMESA Court of Justice with jurisdiction to undertake Arbitration under special agreement of parties, the common market on any of its institutions; the EAC Treaty, Article 32 similarly clothes the EACJ with arbitral jurisdiction involving a contract or agreement in which the community or any of its institutions is a party or special agreements regarding the EAC Treaty submitted by special agreement between partner states or arising out of a commercial contract or agreement in which parties have conferred jurisdiction on the Court; The OHADA Treaty provides an elaborate arbitration law as part of its OHADA CCJA to administer arbitration under the Uniform Arbitration Act.

settlement mechanisms, for resolving disputes over contractual agreements. It is frequently seen as easier and as cheaper for private companies to resort to ADR mechanisms.

Globalisation, technological developments and the complex cross-border nature of modern commercial transactions make uniformity a more expeditious settlement procedure, as well as an attractive option.<sup>799</sup> ADR has, therefore, gained widespread acceptance and has become a standard feature of private commercial dispute resolution.

### **4.3. Structural and Institutional Impediments**

#### ***4.3.1 Appointment Procedure and Qualifications of Judges of the ACJ&HR***

The composition of the Court is set out in Article 3 of the Statute of the ACJ&HR. It provides that the Court shall consist of sixteen Judges who are nationals of the state parties. The appointment of the Judges shall have regard to the geographical regions of the continent, with each region, where possible, represented by three Judges; except for the western region which shall have four (4) Judges.<sup>800</sup> Article 4 of the Statute of the Court proceeds to lay out the qualifications of candidates for the positions of Judges. The Judges shall be elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are juris-consuls of recognised competence and experience in international law and/or human rights.<sup>801</sup> The candidates are then subjected to an election process governed by Article 7 of the Statute of the ACJ&HR.<sup>802</sup>

The qualifications and process of appointment of Judges, present three issues in so far as the General Section of the Court and its trade and investment disputes settlement jurisdiction is concerned. Firstly, the qualifications of Judges are skewed towards a bias in formal training in international law and human rights only. Qualification in international trade and investment law is not a specific requirement. The impression created is that the drafters of the Court's Statute did not hold trade and investment dispute resolution in the same regard as international human rights.

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<sup>799</sup> G Erasmus, (n) 786, 5.

<sup>800</sup> Article 3(1).

<sup>801</sup> Article 4.

<sup>802</sup> The Candidates are elected by the Assembly of Heads of State and Government from the Candidates by a two-thirds majority. Article 7(5) requires that the Assembly ensures that there is equitable gender representation.

For a court which is supposed to develop African trade and investment jurisprudence and direct the growth of the AEC, specific competence and expertise of some judges, who will serve in its General Section, in African international trade and investment law should have been an imperative.

Secondly, the election of judges as provided for under Article 7 of the Statute of the ACJ&HR undermines its judicial independence.<sup>803</sup> Unlike other organs of an international organisation, courts or tribunals must always be free from political or executive direction and control. Judicial independence is underwritten by the process of appointing judges, a guarantee of their security of tenure, as well as an objective and clear process of their removal.

However, the process as currently stipulated in the statute for the appointment of judges leaves the Court vulnerable to the whims of the Council or State Parties who supported their election. This is a result of system proposed in the Statute in which nominees are subjected to an election by the Executive Council of Ministers of the AU, which council constitutes of appointees of the Assembly of Heads of State and Government. Further, the disbanding and the visiting of reprisals, such as refusal to renew the appointment of judges, when they make decisions which are deemed unpopular to governments of member states of RECs, has been experienced in the past with respect to the SADC Tribunal and EACJ.<sup>804</sup> The situation is more worrying since the Statute

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<sup>803</sup> The EU has attempted to reduce the over-politicisation of the Court by reducing the process of appointment of Judges to the CJEU. This included, in the appointment process, a panel comprising members of the Court and National Supreme Courts which would rule on suitability of candidates, from which governments could only appoint candidates after consulting the panel. See P Kapteyn, "Reflections on the Future of the Judicial System of the European Union after Nice" (2001) 20 *YBEL*, 173, at 18809, on debate of the efficiency of this process. See I Solanke, "Diversity and Independence in the European Court of Justice" (2009) 15 *SJEU* 89.

<sup>804</sup> For example, the SADC Tribunal was rendered dysfunctional following its decision in the case of *Mike Campbell v Zimbabwe*, the heads of state of the member states did not reappoint Judges of the tribunal and amended the SADC Tribunal Protocol to limit the Tribunal's jurisdiction to only include state dispute and exclude jurisdiction over claims by individuals. Following the *Anyang Nyong'o case*, Kenya, a member state of the EAC, pushed for the 'killing' of the Court which had made a decision critical of its observance of the Treaty provisions with respect to nominating members to its legislative organ EALA. Similarly, the EAC Council of Ministers, instead of implementing the EACJ decision in *Sebalu v Secretary General of the EAC & others* (2013c) on giving effect to the Protocol on the Appellate and Human Rights jurisdiction of the Court, proceeded to contemptuously revise the draft protocol to exclude this extended jurisdiction of the Court. See K Alter and J Gathii and LR Helfer, (n) 59, 303. See also Apiko, (n) 480, 12-13, 14-15.

of the ACJ&HR does not provide for security of tenure for the Judges of the Court, nor a process for their removal, save that a Judge can only be removed or suspended following a recommendation of two-thirds of other members.<sup>805</sup>

Therefore, the security of tenure, underpinned by an open, transparent and competitive appointment process that does not leave judges beholden to states or persons who supported their candidature, and elaborate removal/suspension procedure, will guarantee independence of the Court in the exercise of its functions.

#### ***4.3.2 Seat of the Court and the need for its Devolution to the sub-regions***

Article 25 of the Statute of the ACJ&HR provides that the seat of the Court shall be the same as the seat of the African Court on Human and Peoples' Rights. The Court may sit in any other member state if circumstances warrant, and with the consent of the member state concerned. The Assembly of Heads of State and Government may change the seat of the Court after due consultations with the Court.

Access to trade and investment dispute resolution is imperative for a properly functioning economic community which the AEC Treaty envisages. The AEC intends to build on sub-regional RECs as blocks towards the Economic Community.<sup>806</sup> This approach is reiterated in the Constitutive Act of the AU, the AfCFTA Agreement and the TFTA.<sup>807</sup> As early as 1980, in crafting the LPA, African states understood that their economic inter-independence and integration is anchored in the establishment of RECs, hence the setting up of SADC in the South, ECOWAS in the West and the EAC in the East.<sup>808</sup>

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<sup>805</sup> Article 9 (2) of the Statute of the ACJ&HR.

<sup>806</sup> Article 6 of the AEC Treaty. The preamble to the AfCFTA also emphasis the role of RECs in the economic integration of continent.

<sup>807</sup> See the preambles to the Constitutive Act of the AU and the AfCFTA available at <https://au.int/en/constitutive-act> accessed on 10<sup>th</sup> October, 2018.

<sup>808</sup> The Lagos, Plan of Action (L.P.A) birthed the formation of the three RECs of EAC, SADC and ECOWAS. See the UNECA report titled: “*Appraisal and Review of the Impact of the Lagos Plan of Action on the Development and Expansion of Intra-Africa Trade*” (1990) <http://repository.uneca.org/pdfpreview/bitstream/handle/10855/14129/Bib-55593.pdf?sequence=1>. accessed on 12<sup>th</sup> October 2018.

Therefore, as Africa steps up continental economic integration, it is important that RECs play a pivotal role. RECs have gathered immense experience at the sub-continental level spanning over 50 years. It is also critical that RECs are not only regarded as building blocks for the continent's integration process, but offer critical structural and institutional infrastructure for the integration. There seems to be a clear road map in Article 6 and 28 of the AEC for the economic integration of RECs on the continent. The road map, however, does not seem to include the integration of dispute settlement systems into the AEC system. Instead, the REC dispute settlement systems remains intact and seems to be operating parallel or side by side to the continental mechanisms. Yet, the objective they serve should be converging at the continental level.

With respect to the seat of the Court, it would enhance access to trade remedies and investment justice if the seat of the ACJ&HR is devolved to the sub-regional RECs in Africa. After all, it is expected that all African RECs will cease to exist when the AEC becomes a reality.<sup>809</sup> It will be good use of existing resources such as buildings, judges, technical support staff and registries of Courts established at sub-regional levels to act as sub-registries and branches of the Court. It will also make it logistically easier for disputants to access the Court in the sub-regions than to travel to its seat at Arusha in Tanzania.

#### ***4.3.3 Enforcement of Judgments of the ACJ&HR***

Enforcement of judgments and decisions of African regional courts and tribunals remains a significant stumbling block to the effectiveness of the use of international dispute resolution mechanisms in Africa. The experiences in the SADC, EAC and ECOWAS have shown reluctance by most African States in obeying or giving effect to decisions of REC adjudicatory bodies, particularly when they seem to offend a member state's government.<sup>810</sup> As a result, many of the

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<sup>809</sup>Article 6 of the AEC Treaty sets a period of 34 (maximum 40) years of the date of the Treaty (1991) for the completion of the continental integration process into the fully-fledged AEC.

<sup>810</sup> See the discussion on the EAC (*Nyong'o Case*), and SADC (*Mike Campbell case*) and their effect on the jurisdiction of the SADC tribunal and EACJ; Chapter 3.4 above. See generally the discussion by Alter, Gathii and Helfer on the lack of independence of regional courts and the weak enforcement mechanisms employed by the courts resulting in their ineffective interventions particularly when undermined by state actors. This is critical since the architecture of



adjudicatory organs have since been met with belligerence or rendered moribund or intimidated into rendering compliant decisions.<sup>811</sup> This approach does not bode well with inspiring confidence, in foreign investors, or in transnational African and foreign traders, who can only invest and trade confidently in the knowledge that there are reliable and independent dispute resolution mechanisms assured in an economically integrated Africa.

Article 46 of the Statute of the ACJ&HR provides for the mechanism for the implementation and enforcement of decisions/Judgments of the Court. The provision set out that the decision of the Court is both binding on the parties and is final. Where a party has failed to comply with the judgment, the Court shall refer the matter to the AU Assembly which shall decide upon the measures to be taken to give effect to the Judgement. Article 23 of the Constitutive Act of the AU gives the AU Assembly the power to impose sanctions on states which refuse to enforce decisions made by an AU organ, which includes the Court. Historical evidence, however, suggests that AU states are usually reluctant to employ this approach in ensuring compliance with its own decisions.<sup>812</sup>

The enforcement of decisions of international courts in Africa has traditionally taken two approaches. The first approach is one where the decision is considered as a foreign judgment and, therefore, has to be enforced only through the strict application of national law as regards to enforcement of foreign judgments.<sup>813</sup> The second approach is whereby the judgement is enforceable as a decision of domestic courts without the rigours of adoption through national law processes.<sup>814</sup> The latter approach is preferred by investor friendly states, such as those in the

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the Community treaties are largely slant towards disputes between states or with states as the usual Respondents before the courts. KJ Alter and J Gathii and LR Helfer, (n) 586, 293-328.

<sup>811</sup> See, the discussion in Chapter 3.4 on the backlash against regional courts by member states in the ECOWAS, EAC and SADC RECs.

<sup>812</sup>M Konstantinos, “The Sanctioning System of the AU: Part success, Part failure?” (2011) *Institute of Security Studies, Addis Ababa, Ethiopia*,

[https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3126&context=soss\\_research](https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3126&context=soss_research).> accessed on 10<sup>th</sup> October, 2018, 3.

<sup>813</sup>MG Bongyu, “The Economic and Monetary Community of Central Africa (CEMAC) and the Decline of Sovereignty” (2009) 44 *Journal of Asian and African Studies* 389, at 393.

<sup>814</sup>*ibid*, 394.

OHADA region.<sup>815</sup> Other effective approaches have also evolved. The ECOWAS Court of Justice has an enforcement organ in each state that can follow the implementation of the decision of the Court.<sup>816</sup> Even with its creative approach to enforcement of its decisions, the ECOWAS Court of Justice has still had to contend with intransigent member states who are unwilling to voluntarily give effect to its decisions.<sup>817</sup>

If the experiences so far drawn from the attitude of African sub-regional RECs, including SADC, ECOWAS and the EAC are anything to go by, then the ACJ&HR cannot rely solely on the whims of the AU Assembly and member states' good will for enforcement of its decisions. The AU sanctions option together with pragmatic solutions modelled around the approaches employed by the OHADA CCJA and ECOWAS offer a useful model. The hybrid approach will give assurance to the Court's users, particularly private parties, of the ability of the Court to render sound independent decisions, and that the decisions will be enforced.<sup>818</sup> The CJEU approach is instructive in this respect. Article 260 of the CJEU Treaty confers jurisdiction upon the Court to sanction a state member whom fails to comply with the Court's Judgment by meting out fines and other punitive orders, including declarations of breach under Article 253 and 259. Similar jurisdiction is absent from the Protocol and Statute of the ACJ&HR.

The role of an effective enforcement mechanism to the success of a regional court cannot be overstated. It is not only important that judges of the court possess the requisite set of skills and competencies in international law, but it is also critical to have effective enforcement mechanisms which ensure the implementation of the court's decision to the letter.<sup>819</sup>

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<sup>815</sup> *ibid.* See also, E Onyema, (n) 56, 7.

<sup>816</sup> F Vijoer, *International Human Rights Law in Africa*, (Oxford University Press Oxford 2007) 505.

<sup>817</sup> Although the examples discussed by Enyinna are largely regarding decisions of the ECOWAS Court of Justice with respect to human rights violations by member states, the cases demonstrate the member states' general attitude towards adverse decisions of the court. See SN Enyinna, "The ECOWAS Community Court of Justice and the Horizontal application of Human Rights" (2013) 13 *AHRCJ* 30-54.

<sup>818</sup> G Musila, "United States of Africa: Positioning the Pan African Parliament and the Court in the Political Union Debate" (2007) *ISS Paper* 142 5-6.

<sup>819</sup> *ibid.*, 10.

#### 4.3.4 *Financial Constraints and Autonomy*

Financial autonomy of a court impinges on the ability of the court to discharge its functions and to render its decisions with the required independence. Article 26 of the Statute of the ACJ&HR provides for the Court's budget. It provides that the Court shall prepare its draft annual budget and shall submit it to the Assembly of Heads of State and Government through the Executive Council of Ministers.<sup>820</sup> The budget of the Court is to be borne by the AU.<sup>821</sup> The Court is accountable to the executive arm of the AU over its budget. The Court is required to submit reports thereon to the Executive Council of Ministers of the AU, in conformity with the Financial Rules and Regulations of the African Union.

It is apparent that no fixed fund for the Court is provided for by the Statute of the Court. It is largely a function of the Assembly and Council of Ministers of the African union. The Court is, therefore, subject to the financial rules, regulations and, indeed, constraints that affect the financing of AU organs and institutions at large.

Constraints on financing are not unique to the AU or the African Court but are almost a permanent feature of African RECs and its sub-regional Courts. This can be seen in the example of the EAC. The EACJ is funded by the EAC as one of its organs.<sup>822</sup> Additionally, the EAC Treaty is funded by equal contribution by partner states and receipts from regional and international donations and any other sources as may be determined by the EAC Council of Ministers.<sup>823</sup> Moreover, the EACJ has financial challenges leading to its largely *ad hoc* operations without a regular schedule, despite its large workload.<sup>824</sup> Apiko observes that the inadequate funding of the EACJ could make the Court vulnerable to the whims of state parties and affect its ability to effectively discharge its functions.<sup>825</sup> Similarly, SADC has limited resources and is largely dependent on donor funding, principally from the EU.<sup>826</sup> Saurombe suggests that this over-reliance

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<sup>820</sup> Article 26 (1) of the Statute of the ACJ&HR.

<sup>821</sup> Article 26(2) of the Statute of the ACJ&HR.

<sup>822</sup>P Apiko, (n) 480, 9.

<sup>823</sup>Article 132(4) of the EAC Treaty.

<sup>824</sup>P Apiko, (n) 480, 10.

<sup>825</sup>*ibid.*

<sup>826</sup>A Saurombe, (n) 614, 104.

on the EU, together with a lack of deliberate efforts to establish self-funding initiatives, has availed an opportunity to the EU taking advantage of SADC members to have them sign lopsided Economic Partnership Agreements (EPAs).<sup>827</sup>

Since the AU's financing model and its sustainability affects the operations of the ACJ&HR, it is useful to briefly examine it. The AU organs' activities are funded by contributions by member states and development partners. In fact, 72% of the AU's budget is funded by external sources.<sup>828</sup> This creates risks associated with over dependency hence undermining ownership of AU programmes. In 2016, the AU adopted a sustainable financing model in order to deal with this problem. The model is founded on four objectives which is to provide reliable and predictable funding for peace and security initiatives; to relieve pressure on national treasuries, to reduce dependency on partner/donor funds; and to provide equitable and predictable sources of financing.<sup>829</sup>

The AU sustainable financing model has two significant features. Firstly, that a 0.2% levy on eligible imports be effected by all African states. Secondly, that a committee of fifteen African Finance Ministers are to be nominated to spearhead the process and oversight of the budget, the reserve fund and the development of a set of "golden rules".<sup>830</sup> The reserve fund is to be used for continental priorities. This research suggests that one of the AU's priority is to benefit from the fund through the implementation of the AEC and by extension, through the ACJ&HR.

The financial sustainability plan of AU operations is still at its nascent stages. The initial resistance to the plan has since waned and 24 countries are currently at various stages of implementing the aforementioned 0.2% levy.<sup>831</sup> However, it should be noted that the 2019 AU

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<sup>827</sup>ibid.

<sup>828</sup>AU report titled "Imperative to Strengthen Our Union: Report on the Proposed Recommendations on Institutional Reform of the African Union", also simply known as the "Kagame Report"

<<https://www.au.int/sites/default/files/pages/34871-file-report-20institutional20reform20of20the20au-2.pdf>>

accessed on 19<sup>th</sup> September 2019. The report is discussed in detail in Chapter 3.2.4 of this thesis.

<sup>829</sup>ibid.

<sup>830</sup>ibid.

<sup>831</sup>K Pharatlhathe and J Vanheukelom, (n) 395 15. <<https://ecdpm.org/wp-content/uploads/DP240-Financing-the-African-Union-on-mindsets-and-money.pdf>> accessed on 21<sup>st</sup> September 2019. For further discourses on this levy, see P Apiko and A Faten, "Can the 0.2% levy fund Peace and Security in Africa? A Stronger AU-UN Partnership in

budget has been significantly cut by 19%.<sup>832</sup> The AU Commission still relies on external donors, such as the EU to finance its operations and programmes.<sup>833</sup> The merger of the ACJ and the ACH&PR to birth the ACJ&HR was justified on the grounds of financial constraints of the AU and its inability to sustain multiple judicial organs.<sup>834</sup> It remains doubtful whether the AU is mandatorily required to make specific annual allocations to its Commission and the Court.<sup>835</sup> Some member states are currently struggling to meet their annual subscriptions to the AU. Many sub-Saharan African states' national budgets are financed through foreign aid, some up to eighty percent.<sup>836</sup> These countries are likely to default on their additional obligation to levy and remit the levy.

The success of the Court therefore largely depends on a well-resourced approach to its establishment and operations.

#### 4.4. Summary

This chapter has explored the jurisdictional, structural and institutional aspects of the ACJ&HR. The first section of this chapter discussed the various aspects of jurisdiction of international courts and tribunals. It made particular reference to trade and investment dispute resolution; including subject matter or express and implied jurisdiction; and the direct access to the Court by individuals,

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Accordance with WTO Rules" (2010) *European Centre for Development Policy* <<https://ecdpm.org/publications/levy-fund-peace-africa>> accessed on 23<sup>rd</sup> September 2019; Also, P Apiko and A Faten (2018) "Analysis on the Implementation of the Africa Union's 0.2% Levy: Progress and Challenges" (2010) *European Centre for Development Policy* <<https://ecdpm.org/publications/analysis-of-the-implementation-of-the-africa-union-levy/>> accessed on 23<sup>rd</sup> September 2019.

<sup>832</sup>ibid, K Pharatlhathe and J Vanheukelom, 15.

<sup>833</sup>G Bekker, "The African Court of Human and Peoples' Rights: Safeguarding the Interest of African States" (2007) 5(1) *Journal of African law* 157.

<sup>834</sup>Article 25(2) of the Statute of the ACJ&HR seems to acknowledge the need to consolidate budgetary requirements of the African Union.

<sup>835</sup>Article 26 of the ACJ&HR Treaty does not specifically require that a budget for the Court be set aside in the AU organs' annual allocations.

<sup>836</sup>MK Jallow, "Foreign Aid and Underdevelopment in Africa" (2010) <<https://www.thenigerianvoice.com/news/84592/foreign-aid-and-underdevelopment-in-africa.html>> accessed on 14<sup>th</sup> December 2018.

ADR and Appellate jurisdictions. It was noted that for the Court to effectively discharge its mandate, under its general section, it is imperative that fundamental aspects of its normative, jurisdictional and institutional framework be addressed. A key point in this respect is the need to root the architecture of the court within an efficacious rule-based regime.

The chapter also examined the structure of the general section of the ACJ&HR, with respect to its trade and investment disputes mandate. It was identified that challenges such as lack of a clear supremacy or subsidiarity in the relationship between the ACJ&HR and national and/or sub-regional courts may lead to an overlapping jurisdictional mandate. This portends a possible problem that may eventually undermine the Court's effectiveness. Reliance on national courts for enforcement of decisions of the ACJ&HR was also found to be a critical problem, particularly since the very same state parties are the primary subjects of the ACJ&HR. Financial constraints of the AU and how these may affect the Court's operations were also addressed. The next chapter addresses these salient matters.

## CHAPTER FIVE

### THE CASE FOR THE AFRICAN SINGLE COURT AS AN OVERARCHING SUPRANATIONAL CONTINENTAL TRADE AND INVESTMENT DISPUTE SETTLEMENT MECHANISM

#### 5.1. Introduction

In Africa's march towards continental economic integration of trade and markets under the AfCFTA and eventually the AEC, it is imperative that the facilitating institutions of the AU also integrate. Specific to this discourse is the integration of continental and sub-regional trade and investment dispute resolution mechanisms. A brief background will put the discussion undertaken in this chapter into a proper framework.

The 1990s heralded a remarkable increase in international dispute settlement mechanisms the world over.<sup>837</sup> This phenomenon led to what is now referred to in international law parlance as the fragmentation of the international legal system or order.<sup>838</sup> The phenomenon was characterised by a proliferation of international dispute resolution mechanisms, with overlapping and sometimes competing, mandates. In this period, both permanent and ad hoc judicial organs meant for the peaceful settlement of international disputes were established. Specialised permanent UN tribunals such as the Tribunal for the Law of the Sea (ITLOS) and the International Criminal Court (ICC)

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<sup>837</sup>A Reinisch, "International Courts and Tribunals, Multiple Jurisdiction" (2011) in *Max Planck Encyclopaedia of Public International Law* <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e41>> accessed on 1<sup>st</sup> April 2019, 1-11, at 1.

<sup>838</sup> *ibid.*

were created.<sup>839</sup> The WTO Dispute Settlement Mechanism also came into being in 1995.<sup>840</sup> Ad hoc tribunals for the former Yugoslavia and Rwanda were also established.<sup>841</sup> On the African continent, various courts and tribunals were also established. The ACJ, the ECOWAS Court of

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<sup>839</sup> The ITLOs was conceived following the UN Conference on the Law of the Sea and was established by Article 30 of UN Convention on the Law of the Sea, signed at Montego Bay, Jamaica, on December 10, 1982. The full text of the Convention <[https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)> accessed on 1<sup>st</sup> April 2019. The ICC is established under the ICC Rome Statute of 1998. It is a complementary mechanism to national and regional mechanisms with jurisdiction to prosecute persons with the highest criminal responsibility over the crimes of genocide, crimes against humanity, war crimes and crimes of aggression; particularly where national and regional courts are unable or unwilling to prosecute such individuals. The ICC Rome Statute came into force in 2002 after achieving the required number of ratifications. The full text of the ICC Rome Statute is available at <<https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>> accessed on 1<sup>st</sup> April 2019.

<sup>840</sup> The WTO is a multilateral global organisation of states and is primarily charged with the creation of rules of trade between nations. The organisation came into existence in 1995 when the 1945 General Agreement on Tariffs and Trade (GATTs) was succeeded by the WTO. The WTO Dispute Settlement Body (DSB) deals with disputes between WTO members and has authority to establish dispute settlement panels, refer matters to arbitration, adopt decisions of panels and the Appellate body, and adopt arbitration awards and reports; and to generally maintain surveillance over implementation of those decisions. A description of the WTO-DSB <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm)> accessed on 1<sup>st</sup> April 2019. See, generally, J Paine, “The Functions of the WTO’s Dispute Settlement Body: A Distinctive Voice Mechanisms” (2018) *Society of International Economic Law (SIEL), Sixth Biennial Global Conference paper* <<http://ilreports.blogspot.com/2018/07/paine-functions-of-wtos-dispute.html>> 1<sup>st</sup> April 2019.

<sup>841</sup> The international tribunal for the prosecution of persons responsible for serious violations of International Humanitarian law (IHL) committed in the Territory of the former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia (ICTY) was created by the UN to prosecute serious crimes committed during the period. It was an ad hoc court established on 25<sup>th</sup> May 1993 and located at The Hague. The Court was dissolved on 31<sup>st</sup> December 2017. The Court’s statute <[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)> accessed on 1<sup>st</sup> April 2019. The International Criminal Tribunal for Rwanda (ICTR) was established in November 1994 by the UN Security Council by Resolution 955 in order to prosecute people responsible for the Rwandan Genocide and other serious violation of international law in Rwanda, or by Rwandan Citizens in nearby states. It was an ad hoc Court established on 8<sup>th</sup> November 1994 and was dissolved on 31<sup>st</sup> December 2015. The Court was seated at Arusha in the United Republic of Tanzania. The rules, structure and jurisdictional mandate is available at <https://unictr.irmct.org/en/tribunal>. accessed on 1<sup>st</sup> April 2019.



Justice, the EACJ and the SADC tribunals, are examples of continental and sub-regional judicial organs which emerged in the 1990s.<sup>842</sup>

This proliferation came with its own challenges, principal of which was the fragmentation of international law and competition of dispute resolution bodies, in a crowded playing field. These challenges were compounded by a multiplicity of member countries to regional, bilateral, multilateral and sub-regional organisations, with similar or near similar objectives. This consequently led to divided loyalties and confusion in the implementation of programmes. The fact that most of these sub-regional organisations created dispute resolution mechanisms led to jurisdictional overlaps with the potential of creating further confusion. Judicial and arbitral organs created by regional organisations formed by countries with diametrically divergent legal systems, underpinned by different philosophical and cultural influences emerged. Additionally, difficulties in developing coherent, consistent jurisprudence and normative values cut across the organisations' membership.

Despite these challenges, the merged single AU Court, the ACJ&HR, offers a viable proposition in converging the continental and sub-regional dispute resolution mechanisms, thereby eliminating most of the challenges of fragmentation of the international legal system, with respect to economic regionalism in Africa.

It is understood, from the afore-analysed chapters of this thesis, that the AfCFTA proposes a dispute resolution mechanism that mirrors the WTO disputes settlement procedure. Both the WTO and AfCFTA mechanisms are only available to state members and not to individuals. The two mechanisms also deal exclusively with trade disputes as opposed to investment disputes. This chapter, therefore, explores viable prepositions for expanding the ACJ&HR's mandate to include a trade and investment chambers to cater for intra-African commercial disputes

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<sup>842</sup>The ACJ was established under Article 28 of the AEC Treaty of 1991 (commonly referred to as the Abuja Treaty); The ECOWAS Court of Justice was established in 1999 under the additional Protocol on the ECOWAS Court of Justice, while the EACJ is established under chapter 8 of the EAC Treaty. The various Courts' structures and jurisdiction are addressed in detail in Chapter 3 of this thesis.

This chapter, firstly, identifies the challenges associated with the multiplicity of international trade dispute resolution in Africa. Secondly, it explores the role that the AU single court can play in consolidating the various regional and sub-regional dispute resolution efforts that are crucial in navigating the challenges identified. The chapter also examines the causes and effects of fragmentation of regional courts, investment arbitration and investment codes, as well as the possible role the African single court can play in harmonising trade and investment dispute resolution in Africa's continental economic regionalism.

## **5.2. Fragmentation and Overlapping Juridical Mandates of International Dispute Resolution Mechanisms in Africa**

### ***5.2.1 Background and Conceptual Basis***

Fragmentation of international law implies, in essence, the competition of normative orders.<sup>843</sup> The terms “fragmentation” and “proliferation” of dispute settlement mechanisms are used interchangeably to refer to the rapid increase of international tribunals addressing similar questions.<sup>844</sup> At the global level, it is a subject that has received considerable attention and attracted quite some discussion.<sup>845</sup> Despite this attention, states and active participants, in the process of the development of international law, seem either oblivious of this phenomenon, or, are not overly concerned with it and perhaps even promote it, consciously or unconsciously.<sup>846</sup>

The problems concerning the multiple dispute settlement fora and the related substantive issue of an increased fragmentation of international law have been the subject of not only academic

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<sup>843</sup>SP Rao, “Multiple International Judicial Forums: A Reflection of the Growing Strength of International law or its Fragmentation?” (2004) 25(4) *Michigan Journal International Law* 929-961, 929.

<sup>844</sup> See, for example, B Kingsbury, “Is the Proliferation of International Courts and Tribunals a Systemic Problem?” (1999) 31 *NYU Journal of International Law and Politics* 679. See also, K Oellers-Frahm, “Multiplication of International Courts and Tribunals and Conflicting Jurisdictions: Problems and Possible Solutions” (2001)5 *Planck Yearbook of UN Law*, 67.

<sup>845</sup> See for example, Y Shany, “The Competing Jurisdiction of International Courts and Tribunals” (2005) 52(2) *Netherlands International Law Review* 10. See Also D Prager, “The Proliferation of International Judicial Organs: the Role of the International Court of Justice” in NIH Blokker and HG Schemers (eds.) *Proliferation of International organisation in Legal Issue* (Kluwer Law International, The Hague 2001) 279.

<sup>846</sup> S P Rao, (n) 843, 929.

attention but also of the International Law Commission (ILC). The risks ensuing from the fragmentation of international law formed the basis of a 2002 ILC study group, while a 2006 ILC report addressed the difficulties arising from the fragmentation of international law.<sup>847</sup> A discussion of these risks as identified and elaborated by the ILC will shortly follow. But first, it would be fair to also briefly highlight some of the benefits of fragmentation of international dispute settlement systems.

### 5.2.2 Benefits of Fragmentation

Scholars have argued that the proliferation of international dispute settlement mechanisms is not always negative as it has some positive effects.

Firstly, it should be acknowledged that the increase in international courts and dispute resolution mechanisms is an obvious acknowledgment of the increasing acceptance and importance of international law and its disputes settlement fora. Even more importantly, this increase in fora has led to variety in international jurisprudence.<sup>848</sup> The various dispute settlement

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<sup>847</sup>In 2000 the ILC decided to include the topic of “Fragmentation of International Law” in its long term working programme after an initial feasibility study. See the text of the feasibility study, G Hafner, (1999) *Risks Ensuing from Fragmentation of International Law*. Available at <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1272&context=mjil>> accessed on 1st April 2019. The 2002 ILC working group report dealt with the topic “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,” also available at <[http://legal.un.org/ilc/guide/1\\_9.shtml](http://legal.un.org/ilc/guide/1_9.shtml)> 1st April 2019. The views in the two reports are extensively reviewed in G Hafner, “Should one Fear the Proliferation of Mechanisms for Peaceful Settlement of Disputes?” in L Gaflish (ed) *The Peaceful Settlement of Disputes between States* (Kluwer Law International, The Hague 1998) 4, 25-41. The 2006 ILC Report by M Koskenniemi, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” (2006) <[http://legal.un.org/ilc/guide/1\\_9.shtml](http://legal.un.org/ilc/guide/1_9.shtml)> accessed on 1<sup>st</sup> April 2019. Koskenniemi and Leino had earlier authored an article addressing contemporary problems associated with fragmentation of international law. M Koskenniemi and P Leino, “Fragmentation of International law? Postmodern Anxieties” (2002)15 *Leiden Journal of International law* 553-579. See also Symposium, “Is the Proliferation of International Courts and Tribunals a Systemic Problem?” (1999) *New York University Journal of International Law and Politics* 679.

<sup>848</sup>A Reinisch, “The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs The Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration” in Buffard, Crawford and Pellet and Wittich (eds) *International Law: Between Universalism and Fragmentation*

tribunals are churning out more international case law, eventually replacing the traditional scarcity of international law precedents previously embodied in the scarcely celebrated ICJ and PCIJ cases.<sup>849</sup> Today, specialised courts in human rights, international criminal law, and regional trade law, develop jurisprudence that is specialised to the region's circumstances and/or the specialised area.<sup>850</sup> This has invariably led to growth of the body of international law and scholarship in the specific areas of interest. In turn, a better focused discourse and scholarly engagement has improved the quality of regional international law and other specialised areas of international law. This is a significant contribution of the proliferation of international tribunals, both ad hoc and permanent, to the body of international law. Rao has aptly observed that the creation of multiple international judicial tribunals is a function of the ever-expanding nature of international law, and is a sign of its growing maturity.<sup>851</sup>

The second significant contribution of the expansion of international dispute resolution mechanisms, relating to economic integration, has been seen in international investment law and commercial arbitration. The remarkable growth of international arbitration has in turn led to the development of a normative international economic law or *Lex mercatoria* (law merchant).<sup>852</sup> This

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*Festschrift in Honour of Gerhard Hafner* (Koninklijke Brill NV, Netherlands 2008) 107-126, at 107. Hafner discusses the positive attributes that come with the specialisation of international organisations, including courts, and the problems that have arisen out of specialised international law or *lex specialis*. The benefits and problems identified by Hafner are discussed in this part of the thesis, in the context of African Continental economic integration. See, G Hafner "Pros and Cons Ensuing from Fragmentation of International Law" (2004) *Michigan Journal of International Law* 25(4) 849-862, at 856-860.

<sup>849</sup>*ibid.*

<sup>850</sup>*ibid.*

<sup>851</sup>SP Rao, (n) 843, 930.

<sup>852</sup> H Booysen discusses the evolution of private international commercial law or *Lex mercatoria*, its subjects, actors, normative elements (or lack thereof); and its codification in H Booysen "Is International Law Relinquishing its Exclusively Public Law Nature?" (1997) 2(2) *Tulsa Journal of Comparative and International Law* 219-231, at 222, 223 and 231. See also JHH Dalhuisen, "The New Lex Mercatoria: An Emerging Challenge to Legal Systems in Cross-Border Transactions" (2016) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2871354](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2871354)> accessed on 1<sup>st</sup> April 2019. SA Stone, "The New Lex Mercatoria and Transnational Governance" (2010) 13 *Journal of European Public Policy*, 627-46. Dalhuisen and Stone discuss features, players and the impact of the new private international

body of law has two unique attributes. The first quality is that it is a complete code being applied to transnational commercial transactions and disputes.<sup>853</sup> Secondly, it has international arbitration as its central dispute resolution feature.<sup>854</sup> In turn, international arbitral tribunals such as the ICSID have led in the shaping of this body of law into a recognisable and applicable form. International investment arbitration has been viewed, in many respects, as a test laboratory of international economic law where many of its pertinent problems have appeared in a particularly visible form.<sup>855</sup>

### **5.2.3 Negative Effects of Fragmentation of International Dispute Resolution Mechanisms**

Fragmentation leads to at least three problems: incoherence of international law, forum shopping and damage to the unity of international law. This next section will therefore highlight these problems.

#### ***5.2.3.1 Incoherence and Inconsistency of International Law Norms***

The notion of fragmentation of international law proceeds from the presumption that the basic unity and integration of international law is vital for the efficient governing of international or transnational relations.<sup>856</sup> Noting the wide breadth and complexity of this phenomenon and the issues that attend it, the ILC commissioned an initial feasibility study of the phenomenon.<sup>857</sup> This feasibility study was undertaken and in a report published in 2000, Hafner identified the following aspects as the key causes and effects of the fragmentation of international law:<sup>858</sup>

- (i) The lack of centralised organs that would ensure homogeneity of and conformity with legal regulations;

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law norms to the traditional understanding of international law. They observe that the growth of the EU has helped shape the “new” mercantile law that has now found itself in national courts, with increasing use and new players.

<sup>853</sup> H Booysen and JHH Dalhuisen, *ibid.*

<sup>854</sup> H Booysen, “International Law and a Legal System; The Quest and the need for a Private Law Leg” (1996) 21 *SAYIL* 60.

<sup>855</sup> A Reinisch, (n) 848, 109.

<sup>856</sup> SP Rao, (n) 843, at p.930.

<sup>857</sup> G Hafner Report (2000), (n) 847.

<sup>858</sup> *ibid.*

- (ii) Specialisation leading to topic autonomy;
- (iii) Political divisions on particular issues;
- (iv) Differing legal structures;
- (v) Parallel regulations;
- (vi) Competitive regulations;
- (vii) Enlargement of the material scope of international law;
- (viii) Multiplication of actors; and
- (ix) Establishment of monitoring bodies and different regimes of secondary rules.

Following Hafner's feasibility study, the ILC commissioned a study which resulted in the 2006 Koskenniemi Report.<sup>859</sup> The report identified "new" and "special types" of "self-contained regimes" and "geographically or functionally limited treaty systems" as creating problems of coherence in international law.<sup>860</sup> The report established that fragmentation often resulted in conflict of normative principles in international law and its application.<sup>861</sup> The report adopted the rather wide notion of "conflict" as being a situation where two rules or principles suggest different ways of dealing with a problem.<sup>862</sup>

Fragmentation, by itself, is not a new phenomenon. Writing over sixty years ago, Jenks drew attention to two aspects that may in future lead to the fragmentation of international law.<sup>863</sup> Firstly, unlike domestic law, there is the general absence of a legislative body for international law. Secondly, is the creation of laws to answer or attend to geographical (regional) or functional (specific) objectives of states.<sup>864</sup> These two fears by Jenks came to pass in the 1990s as regional and specialised courts took root.

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<sup>859</sup>M Koskenniemi Report (2006), (n) 847, 14.

<sup>860</sup> *ibid.*

<sup>861</sup> *ibid.*, 17.

<sup>862</sup> *ibid.*, 19.

<sup>863</sup>WC Jenks, "The Conflict of law-making Treaties" (1953) 30 *BYBIL* 403.

<sup>864</sup> *ibid.*

Fragmentation of international legal norms is, therefore, feared if rights and obligations under one regime of international law are not uniform and vary from another group or organisations of states.<sup>865</sup> For example, this scenario could occur if different standards of compliance are prescribed under similar obligations in different international organisations with the same membership. This is also possible where obligations conflict with one another in organisations with common membership.<sup>866</sup> For example, regional treaties may conflict with UN obligations or even the UN Charter. At the continental and sub-continental level, many African states subscribe to several RECs with similar obligations. In the absence of clear hierarchical preference or order of norms, conflict is bound to arise.<sup>867</sup> The likely effect of this multiplicity, in the African context, will be discussed later in this chapter.

### ***5.3.2 Forum Shopping and Duplicity of Proceedings***

The second danger of fragmentation of international dispute settlement systems is forum shopping and the likelihood of duplicity of proceedings. Although a multiplication of available judicial and quasi-judicial fora has admittedly enlarged international case-law and strengthened international law, the danger of providing opportunity for forum shopping still looms large.<sup>868</sup> There is also, equally, the danger of duplication or multiplication of proceeding before different fora with equal or competing competence, leading to a waste of judicial resources.<sup>869</sup> If litigated to the end, multiple proceedings may result in divergent or contradictory outcomes.<sup>870</sup>

A few examples might help put the gravity of this problem into context. In international investment dispute settlement, two tribunals of equal competence have sharply disagreed over similar issues of law within a relatively short span of time. In the case of *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan (SGS v Pakistan)* and *SGC Société Générale de Surveillance SA v Republic of Philippines (SGS v Philippines)*, two ICSID arbitral tribunals came

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<sup>865</sup>SP Rao, (n) 843, 934.

<sup>866</sup>D Shelton, "International Law and Relative Normativity" (2003) in MD Evans (ed), *International Law* 145,146.

<sup>867</sup>SP Rao, (n) 843, at 934.

<sup>868</sup>A Reinisch, (n) 848, 1.

<sup>869</sup>A Reinisch, (n) 848, 114.

<sup>870</sup>A Reinisch, (n) 848, 1-2.

to remarkably different results concerning the interpretation of jurisdictional provisions in Bilateral Investment Treaties (BITs).<sup>871</sup> In the 2003 *SGS v Pakistan* decision, the panel held that it lacked jurisdiction to adjudicate on mere contract claims, this is despite the tribunal basing its decision on the applicable BIT which broadly provides for settlement of “disputes with respect to investment between a contracting party and an investor of the other contracting Party”.<sup>872</sup> This interpretation was rejected by another ICSID tribunal in the 2004 *SGS v Philippines* decision on jurisdiction, where an identical dispute settlement provision was considered. The tribunal also expressly renounced any system of binding precedence under the ICSID Convention or international law in general.<sup>873</sup>

Trade dispute resolution also faces similar problems but mostly where both regional and global dispute settlement mechanisms may be available at the same time. A prominent example of this jurisdictional overlap is in the dispute between the USA and Canada before the NAFTA panels, on the one hand, and before the WTO panels, on the other hand.<sup>874</sup> By the end of 2005, the inherent danger of contradictory outcomes had apparently materialised when a WTO panel found that certain lumber imports from Canada threatened to cause material injury to USA competitors, while a NAFTA committee found that a threat of such material injury could not be ascertained.<sup>875</sup>

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<sup>871</sup>*SGS v Philippines* (ICSID Case No. ARB/02/6) and *SGS v Pakistan* ICSID Case No. ARB/01/13. Decisions on jurisdiction: *SGS v Pakistan* 18 ICSID Review – FILJ 301(2003) 42ILM 1290(2009) *SGS v Philippines* – 29<sup>th</sup> January 2004, 8 ICSID Review p. 515.

<sup>872</sup> Article 9 (1) of the BIT between the Swiss Confederation and the Islamic Republic of Pakistan Concerning the Promotion and Reciprocal Protection of Investments, 1995 <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2721/pakistan---switzerland-bit-1995->> accessed on 5<sup>th</sup> May 2019.

<sup>873</sup> *SGS v Philippines*, (n) 871 [97].

<sup>874</sup> The WTO panel case: *United States – Investigation of the International Trade Commission on Softwood Lumber from Canada (2001-2006) Canada vs US*, <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds277\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds277_e.htm)> NAFTA Committee case: *Re Certain Softwood Lumber Products from Canada*. See generally, DA Gantz, “Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties” (1999) 14(4) *American University International Law Review* 1025-1106.

<sup>875</sup>*ibid*.



A good example of forum shopping and duplicity of proceedings was seen in what is commonly referred to as the “swordfish dispute” between Chile and the EU.<sup>876</sup> The dispute concerned fishing rights and conservation measures regarding this highly migratory fish species. The controversy led to the parallel establishment of a WTO panel and an ITLOS chamber – both in 2000. While the EU alleged a GATT violation on the part of Chile, Chile considered the European fishing practices to be contrary to provisions of the United Nations Convention on the Law of the Sea (UNCLOS). Both claims seemed meritorious and, in the end, potentially contradictory outcomes were averted by an agreement in 2001 to suspend both proceedings.

Two other examples that merit a brief discussion, because of the extreme conflicting dispute settlement outcomes that occurred, are: *Lauder v The Czech Republic* and *CME Czech Republic v The Czech Republic (CME v Czech Republic)*.<sup>877</sup> These were arbitration proceedings involving the same disputes between the Czech Republic and a foreign investor who claimed that various acts and omissions of the Czech Media Council, during the 1990s, constituted violations of investment protection standards.<sup>878</sup> Such standards included issues of fair and equitable treatment, full protection, security, and the prohibition of expropriation.<sup>879</sup> In the first arbitration between Mr Lauder and the Czech Republic, in accordance with UNCITRAL Rules, provided under the U.S.-Czech BIT, the tribunal unanimously held that Czech Republic had committed a breach of its obligations under the U.S.-Czech BIT in relation to some of the alleged events, although this breach did not give rise to liability on the part of the Czech Republic.<sup>880</sup> In a matter

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<sup>876</sup>DS, WTO panel case: *Chile –Measures affecting the Transit and Importation of Swordfish*, DS 1993 (2000). <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds193\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm)> accessed on 1<sup>st</sup> April, 2019. ITLO case no. 7 of 2003 (Chile vs EC). These cases are discussed in detail in terms of the conflict between international law of sea and trade law dispute resolution. Tobias and Voveky “The Swordfish Case: Law of the Sea v Trade” (2002) <[https://www.zaoerv.de/62\\_2002/62\\_2002\\_1\\_a\\_21\\_36.pdf](https://www.zaoerv.de/62_2002/62_2002_1_a_21_36.pdf)> accessed on 1<sup>st</sup> April. 2019, 21-35.

<sup>877</sup>*Lauder v The Czech Republic*, UNCITRAL 3 September 2001, 9 ICSID Reports 66. 14 world Trade and Arbitration Materials, (2002) at p.35 and *CME Czech Republic BV v the Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, 9 ICSID Reports 121; 14 *World Trade and Arbitration Materials* (2002) at p. 109.

<sup>878</sup>A Reinisch, (n) 848, [15].

<sup>879</sup>ibid.

<sup>880</sup> See CN Brower and JK Sharpe, “Multiple and Conflicting International Arbitral Awards” (2003)4 *The Journal of World Investment and Trade* 211.

of days, in a second subsequent ICSID arbitration launched by a company controlled by Mr Launder, against the Czech Republic, pursuant to the Netherlands–Czech BIT, claiming the same violations and relying on the same facts as Mr Launder had in the earlier proceedings, another award was rendered.<sup>881</sup> The Award rendered in September 2001, in the *CME v Czech Republic*, was in the nature of a partial award.<sup>882</sup> It made a conclusion that was diametrically opposed to the *Lauder v Czech* award, and particularly reached a finding of liability against the Czech Republic.<sup>883</sup>

The reactions that followed the *Lauder v Czech* and *CME v Czech* arbitrations were mostly negative.<sup>884</sup> Most legal commentators considered conflicting arbitral awards as being a serious threat to the stability and predictability of international law in general and international dispute settlement in particular.<sup>885</sup> These two decisions, read together with the conflicting outcomes in the two *SGS v Philippines* and *SGS v Pakistan* decisions may have motivated treaty-makers to seriously consider the establishment of an appellate mechanism in international investment arbitration as is currently discussed within the ICSID framework.<sup>886</sup>

Investment arbitration and its increased use owes much of its attractiveness to the likelihood of compliance with its outcomes.<sup>887</sup> With the risks that come with the proliferation of investment disputes settlement mechanisms, this attractiveness is not guaranteed. The concurrent

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<sup>881</sup>*ibid.*

<sup>882</sup> *CME Czech Republic BV v The Czech Republic*, UNICITRAL, Partial Award of 13 September 2001, 9 ICSID Reports 121; 14 *World Trade and Arbitration Material*, 109 (2002).

<sup>883</sup>*ibid.*

<sup>884</sup>A Reinisch, (n) 848 [16].

<sup>885</sup>*ibid.*

<sup>886</sup>A proposal is under discussion on the establishment of an appellate institution within ICSID system. The present ICSID Convention only provides for annulment of awards by special ad hoc committees. The grounds for annulment are, however, limited to extreme procedural defects of the arbitration proceedings and, therefore, do not give rise to wide powers of substantive review. Articles 50-52 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965 ICSID Convention). The Convention is available at <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>.> accessed on 6<sup>th</sup> May 2019.

<sup>887</sup>A Reinisch, (n) 848, 114.

availability of different investment disputes settlement systems may lead to parallel proceedings, or the re-litigation of already decided cases.<sup>888</sup> This phenomenon is not limited to investment arbitration but is a general problem in the global environment of an increased availability of international dispute settlement mechanisms.<sup>889</sup>

Forum shopping, duplication and multiplication of proceedings lead to a waste of judicial resources as well as the threat of divergent, or even conflicting outcomes. They may, ultimately, contribute to the further fragmentation of international law and weaken both the coherence and credibility of international law.<sup>890</sup> In the long run, these problems may undermine the confidence of investors and states in the system.<sup>891</sup>

### ***5.2.2.3 Threat to the Unity of International law***

The third threat posed by the proliferation of international dispute settlement systems is the disintegration of the unity of international law.<sup>892</sup> This concern has been raised at no less than the highest echelons of international dispute resolution, the ICJ.

Gilbert Guillaume, a former President of the ICJ, is on record as having stressed that the fragmentation of the international law, is a direct result of multiple judicial fora on the international plane.<sup>893</sup> He interrogated the role of ITLOS; international criminal courts, both ad hoc and permanent tribunals; and arbitration as viable methods of dispute resolution in the body of international dispute settlement.<sup>894</sup> Guillaume reached the conclusion that although the contribution of these systems to the creation of international peace and good order in their respective limited spheres is commendable, they pose imminent “dangers for international law,

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<sup>888</sup>ibid.

<sup>889</sup>ibid.

<sup>890</sup>A Reinisch, (n) 848, 114.

<sup>891</sup>ibid, 119.

<sup>892</sup> Koskeniemi and Leino, (n) 847, 555.

<sup>893</sup>In his address to the Sixth Committee of the UN General Assembly in 2000, in his capacity as the President of the ICJ, Judge Gilbert Guillaume emphasised that the dangers of fragmentation of international law were a product of multiple judicial fora. His concerns are captured in SP Rao, (n) 843, 938.

<sup>894</sup>ibid.

resulting from the increasing number of judicial institutions in the modern world.”<sup>895</sup> In his view, the risk of these different tribunals delivering divergent opinions on the same point of international law was real and damaging to the unity of international law.<sup>896</sup>

Guillaume observed that a divergence of opinion between two international tribunals showed that proliferation of tribunals was accompanied by “a serious risk of loss of control.”<sup>897</sup> He reiterated these concerns in his address to the UN General Assembly in 2001 by arguing that the proliferation of international courts could jeopardise the unity of international law and, as a consequence, undermine its role in inter-state relations.<sup>898</sup>

Guillaume is not alone in this view. Two other Presidents of the ICJ, Stephen Schwebel and Robert Jennings, have echoed Guillaume’s sentiments.<sup>899</sup> Schwebel went even further to propose that other international tribunals should seek advisory opinions from the ICJ “on issues of international law that arise before those tribunals that are of importance to the unity of international law,” as a possible solution to the emerging problem of disunity of international law.<sup>900</sup> This suggestion was also made by Guillaume.<sup>901</sup>

Some may argue that the suggestions, guised as advancing the unity of international law is nothing but a veiled attempt at elevating the ICJ to a supervisory organ of other international courts and tribunals, and is aimed at creating a hierarchical order of courts on the international plane. However, the undeniable fact is that fragmentation of the international dispute settlement system is a cause for genuine concern.

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<sup>895</sup>ibid.

<sup>896</sup>G Guillaume, “The Future of International Judicial Tribunals” (1995) 44 *Journal of International Law Quarterly* 848, 861-862.

<sup>897</sup>M Koskeniemi and P Leino, (n) 847,555.

<sup>898</sup>ibid.

<sup>899</sup> ibid.

<sup>900</sup>ibid, 554.

<sup>901</sup>Guillaume, (n) 896, 862.

### 5.3. Fragmentation in the Context of African Economic Regionalism

#### 5.3.1 The “Spaghetti Bowl” Problem

“Spaghetti Bowl” is a term coined by Bhagwati.<sup>902</sup> He argues that the multiple membership of countries in RECs has resulted in overlapping of tariff regulations, objectives, divided loyalty and other obligations.<sup>903</sup> This phenomenon has the undesirable effect of “a limb and spoke” system of RECs with complex and multiple regulation.<sup>904</sup> This has in turn led to the weakening of the global trade system.<sup>905</sup> It equally creates an enforcement nightmare to customs officials and observance difficulties to traders. This is a situation whose consequences even the WTO secretariat has warned of.<sup>906</sup>

Bachinger and Hough observe that every African country is currently a member of averagely four different trade blocs, creating the famous spaghetti bowl of RIAs.<sup>907</sup> They further noted that the plan of the AU is to integrate the various RIAs into one large economy with the ultimate goal of unifying the continent and creating a United States of Africa by 2030.<sup>908</sup>

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<sup>902</sup>J Bhagwati, “US Trade Policy: The Infatuation with FTAs” (1995) *Columbia University Discussion Paper Series No.728* 4. The phenomenon was also subsequently discussed in J Bhagwati and A Panagariya (eds) *The Economics of Preferential Trade Agreements* (AE press Washington DC 1996) 8-27.

<sup>903</sup> *Ibid.* see also, J Bhagwati and D Greenaway and A Panagriya, “Trading Preferentially: Theory and Policy” (1996) 108 *The Economic Journal* 1128-1148.

<sup>904</sup>This is Gantz’s description of the “spaghetti bowl” problem. D Gantz, “Regional Trade Agreements” (2009) in D Bethlehem and others (eds.) *The Oxford Handbook of International Trade* (Oxford University Press Oxford 2009) 244. See also, Bachinger and Hough, (n) 23, 43-44.

<sup>905</sup>*Ibid.*

<sup>906</sup>*Ibid.*

<sup>907</sup> Bachinger and Hough, (n) 23, 43-44. The AU Agenda 2063 is an ambitious plan for a prosperous Africa building on the African RECs based on a 25, 10, 5 year and short term plan for integrating the continent. The agenda envisages political Unity of the Africa will be culmination of the Economic and Political integration process characterised by a continental government and institutions by 2030. With the coming into force of the AfCFTA Agreement and the TFTA Agreements, the average membership of African nations in RECs may now be six. See also the Africa Regional Integration Index Report 2016 <<https://www.tralac.org/documents/news/2771-com2019-africa-regional-integration-index-report-arri-2019-presentation/file.html>.> accessed on 8<sup>th</sup> May 2019.

<sup>908</sup>*Ibid.*

For instance, most SADC members are also parties to an EPA with the European Union (EU) through the Southern African Customs Union (SACU).<sup>909</sup> South Africa is also a party to a free trade agreement with the EU.<sup>910</sup> The parties to SADC are also members of the COMESA, while some member of the EAC are also members of the SADC and COMESA.<sup>911</sup> The EAC, on its own, is also negotiating trade agreements with the EU.<sup>912</sup> SADC, EAC and COMESA members are also member states of the TFTA.

The conclusion drawn from this complex web of a multiplicity of multilateral and bilateral trade agreements, involving the very same parties, is that it has become a source of divided loyalty.<sup>913</sup> It has created expensive engagements for poor African economies to maintain and confusion for transnational business people as to the applicable regime.<sup>914</sup> It has also encouraged trade deflection and negatively affected the attainment of multilateral trade in Africa, and as a

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<sup>909</sup> R Kirk and M Stern. “The New South African Customs Union. Agreement 2005” *The World Economy* 28(2) 169.

<sup>910</sup> The SADC –EU Economic Partnership Agreement legal texts available at [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153915.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf) . Accessed on 5<sup>th</sup> May 2019.

<sup>911</sup> For example, Zambia, Tanzania and Zimbabwe are members of both SADC and COMESA. Tanzania is also a member of EAC.

<sup>912</sup> On the Economic Partnership Agreement between the EU and the EAC, see the status report at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620218/EPRS\\_BRI\(2018\)620218\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620218/EPRS_BRI(2018)620218_EN.pdf) . Accessed on 5<sup>th</sup> May 2019. Ouma views the current deadlock in negotiating a new agreement as having been caused by matters “deeper than the merits of the Agreement concerned”. She sees the ineffectiveness of the decision-making process, as well as the lack of proper constitution of a representative body in the negotiations, as having facilitated the advancement of national interests over the collective interests of the East African Community, hence the stalemate. See, P Ouma, “The EU – EAC Economic Partnership Agreement Standoff: The Variable Geometry Question” (2019) <<http://www.afronomicslaw.org/2019/05/30/the-eu-eac-economic-partnership-agreement-standoff-the-variable-geometry-question/>> accessed on 30<sup>th</sup> September 2019 [1].

<sup>913</sup> UO Uzodike, (n) 88, 36. Jelle argues that the AfCFTA presents African states with an opportunity for a better structured economic Agreement with the EU. A prospect the EU is already warming up to. With a larger market, it is hoped that the negotiating scales will tilt, or at least sway, in favour of Africa. See A Jelle, “With AfCFTA in Mind: New Dawn for Afro-EU Relations?” (2019) <<http://www.afronomicslaw.org/2019/05/27/with-afcfta-in-mind-new-dawn-for-afro-eu-relations/>> accessed on 30<sup>th</sup> September 2019.

<sup>914</sup> *ibid*.

ripple effect, on the global plane as well.<sup>915</sup> Mistry observes that dual or multiple membership of RECs creates complications and retards progress, as a country may become a conduit for leakage from one [regional] arrangement to another.<sup>916</sup>

A further layer of multilateral trade integration is in the form of the AfCFTA. The AfCFTA Agreement, the AEC, and the TFTA, all propose that member states should maintain memberships in COMESA, EAC and SADC while still pursuing integration at the continental level.<sup>917</sup> This may end up complicating and entangling the “spaghetti bowl” even further, so that one may not be able, at the end of the day, to tell the true existence, value or even difference between any of the RECs. They may all be lost in the complex web and drowned in the swamp of treaties and the myriad of protocols attendant thereto, both at the continental and sub-regional REC levels.

The maintaining of parallel REC structures while developing the AfCFTA and AEC may have been well meaning, mainly due to efforts at ensuring seamless transition at the end of the integration process. However, in the intervening period, the existence of several integration efforts pulling in different directions does not augur well for the timeous fusion and integration of the merging RECs into the AfCFTA and AEC.

Articles 4(2) (a), 6 (2) (a) of the AEC Treaty, the preamble TFTA Agreement, and Article 19(2) of the AfCFTA Agreement, expressly encourage the continued existence of and/or establishment of “future” RECs. Yet, the essence of the TFTA Agreement and AEC Treaty is to build a multilateral trading and economic system that cuts across the entire continent, as opposed to sub-regional trading blocs. It is, therefore, tempting to conclude that in their to attempt sell the idea of the AEC and the TFTA, the drafters of both instruments sought to appease states’ fixations, investment (in time, money and systems) and sentimental attachment to their respective RECs. The TFTA and AEC may have found acceptance but at the same time sacrificed and undermined the very objectives for which they were set up.

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<sup>915</sup>ibid.

<sup>916</sup> PS Mistry, “Africa’s Record of Regional Cooperation and Integration” (2000) 99(397) *African Affairs* 570.

<sup>917</sup>Articles 4(2) (a), 6 (2) (a) of the AEC Treaty; the preamble TFTA Agreement and article 19 (2) of the AfCFTA Agreement.

To allow and actively encourage the setting up of new sub-regional trading blocs will, invariably, regress the realisation of both the AEC and TFTA. This is tantamount to taking three steps forward and two backwards so as to allow the new RECs to catch up with the integration process. In the end, the process will inevitably stall or run on the spot. The permissive language used in the AEC Treaty and the TFTA with respect to maintaining the existing sub-regional RECs while at the same time establishing new RECs is injudicious, misconceived and inconsistent with their overall continental integration objectives.

The cost of administering trade agreements and their dispute settlement organs is another significant hurdle. For example, all the TFTA members belong to at least 4 RECs, excluding bilateral and multilateral trade arrangements.<sup>918</sup> These arrangements require administration both internally (within the state), at the REC and the WTO levels. Additionally, the need to fund the operational costs of the trade arrangements, its secretariats and the bureaucracies' attendant thereto, is unsustainable particularly for frail foreign aid weaned and dependent sub-Saharan Africa states, which form the bulk of the AfCFTA.<sup>919</sup> Furthermore, these countries have to juggle their priority expenditure with the meeting of its many subscription obligations arising from the multiple trade arrangement memberships.<sup>920</sup> Consequently, many states are serial and chronic defaulters in meeting their treaty subscription obligations and as a result, the integration organs are poorly funded, slowing down the integration process. This is a reality which faces the AfCFTA Agreement and its organs including its dispute settlement mechanisms.

The Draft Protocol on the AU Relations with RECs is meant to offer a proposition that will either eliminate or at least ameliorate fragmentation and its effects as witnessed in economic integration.<sup>921</sup> The Draft Protocol seeks to advance the theme of harmonisation of the policies,

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<sup>918</sup>Bachinger and Hough, (n) 23, 43-44.

<sup>919</sup>UO Uzodike, (n) 88.

<sup>920</sup>*ibid.*

<sup>921</sup>Draft Protocol on the Relations between the African Union and the Regional Economic Communities <[https://wits.worldbank.org/GPTAD/PDF/annexes/AEC\\_protocols.pdf](https://wits.worldbank.org/GPTAD/PDF/annexes/AEC_protocols.pdf)> accessed on 9<sup>th</sup> May 2019. According to O



operations, objectives and programmes undertaken by sub-regional RECs on the continent.<sup>922</sup> To this end, an entire structure, complete with a secretariat and technical committees, is set up to oversee the implementation of the Protocol.<sup>923</sup>

Though still at the draft stage, several concerns are apparent, even from a cursory reading of the text of the proposed Protocol. Firstly, the Protocol rightly notes that both the AEC Treaty and the AfCFTA Agreement are primarily meant to harmonise, coordinate and consolidate economic regionalism in Africa.<sup>924</sup> The AfCFTA Agreement also defines, in fairly clear terms, the relationship and hierarchical order of AU and REC norms.<sup>925</sup> The AEC Treaty is, in fact, succinct to this end by providing, in Article 6, the step-wise harmonisation process complete with milestones to be achieved within set timelines. Article 6 of the AEC Treaty contemplates the establishment of a FTA within ten years of the Treaty. Although the AfCFTA came into being more than fourteen years after the AEC Treaty contemplated, it marked an effort to put in place the FTA envisioned under Article 6 (2) (c) of the AEC Treaty. However, the problem is that this critical step towards the AEC is coming at least 8 years late.<sup>926</sup> Furthermore, the Draft Protocol that is supposed to harmonise the relationship between the AU and RECs is coming midstream to the implementation of Article 6 of the AEC Treaty, and 10 years to the date earmarked for realisation of the continental economic community.<sup>927</sup> It does not help matters that the Protocol is still in draft. The stark reality is that, at the current pace, it is unlikely that the AEC will be realised by 2030 as planned.

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Kaaba and B Fagbayibo, this Draft protocol is unhelpful in advancing the rule of law on the continent since it is yet to be adopted and is largely ambiguous. See O Kaaba and B Fagbayibo, (n) 107.

<sup>922</sup> See the Preamble, Articles 2 and 3 of the Draft Protocol.

<sup>923</sup> Chapter Two of the Protocol sets out its institutional framework.

<sup>924</sup> Articles 3 and 4 of the AEC Treaty; and the Preamble Article 3 and 4 of the AfCFTA Agreement.

<sup>925</sup> Article 19 of the AfCFTA Agreement provides that the Agreement shall prevail in the event of any inconsistency between it and any regional agreement.

<sup>926</sup> According to Article 6 (2) (c) of the AEC Treaty, a FTA should have been established within 10 years of the coming into force of the Treaty (1994), i.e by 2004.

<sup>927</sup> According to Article 6 (2) (a) of the AEC Treaty, the harmonisation of RECs should occur within 5 years of the 1994 (when Treaty came into force) treaty, i.e by 2000. The Protocol remains a draft 10 years since it was mooted.

Secondly, while the Protocol is detailed on the socio-economic areas of cooperation and harmonisation, it is silent on the harmonisation, coordination and hierarchical relations between AU and REC dispute settlement mechanisms.<sup>928</sup> This is with particular reference to economic integration. On dispute resolution, the Protocol says nothing more than to confer jurisdiction upon “the Court of Justice of the Union” over disputes arising out of the interpretation or application of the provisions of the Constitutive Act of the AU, the AEC Treaty, the Protocol itself and the treaties establishing RECs.<sup>929</sup>

Thirdly, the Protocol will come into force upon endorsement by the AU Assembly of Heads of State and Government; and also when signed by the Chairperson and Chief Executives of at least three (3) RECs.<sup>930</sup> While it is appreciated that a minimum threshold for accession to the Protocol is necessary, a process meant to harmonise the economic communities of Africa into a continental vehicle must, out of necessity, carry along all the RECs. If not, there is always the lurking danger of sectional continental integration, which is inimical to the establishment of the desired continental market.

There have been significant developments since the Draft Protocol on AU Relations with RECs was prepared, and whose effect must be taken into account in the final or future versions of the Protocol. For instance, the 26-member TFTA Agreement was concluded in 2015.<sup>931</sup> The TFTA

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<sup>928</sup>Article 2 of the Protocol defines the scope of its application to include implementation of measures in the economic, social, political and cultural fields including gender, peace and security. Article 2 (b) provides for the harmonisation and coordination of macro-economic policies in peace and security policies, agriculture, industry, transport and communication, energy and environment, trade and customs, monetary and financial matters, integration legislation, human resources, gender, tourism, science and technology, cultural and social affairs, democracy, governance, human rights and humanitarian matters.

<sup>929</sup> Article 32, the dispute resolution clause of the Protocol. Curiously the drafters of the Protocol seem to be oblivious of the merger of the AU courts and the creation of a single court hence their erroneous reference to the “Court of Justice of the Union”, a non-existent entity.

<sup>930</sup> Article 33 of the Protocol.

<sup>931</sup> The TFTA; its objectives, structure and dispute resolution system; is discussed in Chapter 3.4.4 of this thesis. Nalule observes that the complete absence or even mere mention of the Draft Protocol in AfCFTA Agreement is telling of the commitment of AU member states towards continental economic integration. The AfCFTA being an

is by far the largest sub-continental REC in Africa. The current draft of the Protocol only recognises 8 RECs in Africa.<sup>932</sup> A more current version of the Protocol should identify and appropriate a more central role to the TFTA, particularly with regard to the economic integration of the continent. Significantly, the TFTA, a conglomerate of three established RECs in Africa, provides a viable and less protracted proposition to bringing together 26 African states at one go and through one REC.

Fourthly, the Protocol presents yet another example of top-to-bottom approach to economic integration in Africa. This approach is characterised by the creation of continental and sub-continental integration bodies. These were created by governments and technocrats without the input of the common people on the streets, whom these efforts are supposed to serve or benefit.<sup>933</sup> It has, therefore, been suggested that this approach has always spelt doom to the integration of markets in Africa because the common people do not own the process and hence feel far removed from it.<sup>934</sup> Fagbayibo aptly addresses this criticism, by suggesting that the debate and processes of regional integration should be moved from an elitist framing to the grassroots:

In addition, there is a need to “privatise” the process of regional integration by ensuring popular participation and an ample support base. For the success and sustainability of this process, it is imperative that the debate surrounding regional integration is moved from the elitist realm of technocrats, civil societies and the academia to a forum that seeks to inform the African populace about the benefits and the drawbacks of integration and to garner their

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effort at harmonising RECs in Africa should have specifically mentioned and related itself with the Draft Protocol. See, Nalule, “The Treaty Establishing the African Economic Community and the Agreement establishing the African Continental Free Trade Area: Some Relational Aspects and Concerns” (2019) <<http://www.afronomicslaw.org/2019/08/14/the-treaty-establishing-the-african-economic-community-and-the-agreement-establishing-the-african-continental-free-trade-area-some-relational-aspects-and-concerns/>>\_ accessed on 23<sup>rd</sup> September 2019 [8].

<sup>932</sup> The Protocol seems to only make provision for eight RECs in Africa, namely: ECOWAS, COMESA, ECCAS, SADC, IGAD, CEN-SAD, AMU and EAC. See also the commentary by the AU <<https://au.int/en/organs/recs>> accessed on 23<sup>rd</sup> September 2019 in which only 8 RECs are named as being the subjects of the Protocol.

<sup>933</sup>B Fagbayibo, (n) 114, 503.

<sup>934</sup>ibid.

opinions. The “common man or woman” in the streets of, *inter alia*, Kigali, Arusha, Kumasi and Maputo should be given an opportunity to contribute to this debate. The fact the majority of the continent’s population is illiterate and impoverished makes the issue of popular mobilisation more important.<sup>935</sup>

### ***5.3.2 Fragmentation of International Investment Arbitration in Africa***

At least sixty-four arbitration institutions exist in Africa.<sup>936</sup> Most of these are moribund institutions struggling to survive or even break ground.<sup>937</sup> However, some centres are up and running and have shown positive signs of growth. Some of the prominent African Arbitral institution include: the Cairo Regional Centre for International Commercial Arbitration (CRCICA),<sup>938</sup> the Lagos Regional Centre for International Commercial Arbitration (LRCICA),<sup>939</sup> Arbitration Foundation of South

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<sup>935</sup>ibid.

<sup>936</sup> EN Torgbor, “Privatisation of Commercial Justice through Arbitration; The Role of Arbitration Institutions in Africa” (2015) *Alternative Dispute Resolution* 109-121, 114.

<sup>937</sup>ibid.

<sup>938</sup> CRCICA was established in 1979 by an international agreement signed between the Egyptian government and the Asian African Legal Consultative Organisation (AALCO). It offers arbitration administration services for both international and domestic arbitration under its own rules and the ICC, ICSID, Permanent Court of Arbitration (PCA) and Court for Arbitration for Sports (CAS) Rules. It is based in Cairo, Egypt. It has so far dealt with over 1000 disputes and is a popular seat for arbitration in the North Africa-Arab-Middle East region. See, <<https://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2019/1190107/crcica-overview>> accessed on 8<sup>th</sup> April 2019. AALCO is an intergovernmental organisation comprising 48 countries and was established for purpose of advancing the said economic and political interests of Asian and African Countries. For details see, <<http://aalco.int/scripts/view-posting.asp?recordid=10>> accessed on 8<sup>th</sup> April, 2019.

<sup>939</sup> The LRCICA was established under the AALCO framework in 1989. It commenced operations in 1999 after the agreement establishing it was ratified in accordance with Nigerian law. It is based in Lagos-Nigeria. See, <<https://rcical.org/index.php/corporate-profile/>> accessed on 8<sup>th</sup> April 2019.

Africa (AFSA),<sup>940</sup> the Uganda Centre for Arbitration and Dispute Resolution (CADR),<sup>941</sup> the Kigali International Arbitration Centre (KIAC),<sup>942</sup> the Lagos Court of Arbitration (LCA),<sup>943</sup> the Nairobi Centre for International Arbitration (NCIA),<sup>944</sup> the African Arbitration Association

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<sup>940</sup>AFSA was founded in 1996 and is a joint venture between business community, legal and accounting professions. It administers both domestic and international arbitrations. It also offers training in ADR. It is based in Sandton, South Africa with branches in major cities in the Country. See, <https://arbitration.co.za/a-brief-history/>. accessed on 8<sup>th</sup> May 2019.

<sup>941</sup> CADR was formed in 1989. It is based in Kampala Uganda and provides both ADR training and administrator of dispute resolution mechanisms. It has memberships at both corporate and individual level, and is the premier ADR organisation in Uganda. It is a non-profit member organisation that is independent of the state in its operations. See <<http://www.monitordirectory.co.ug/listing/centre-for-arbitration-dispute-resolution-53f5414822f67.html>> accessed on 8<sup>th</sup> April, 2019. See also, generally, AC Kakooza, “Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects” (2009) 7(2) *Uganda Living Law Journal*, 268-294.

<sup>942</sup> KIAC was launched on 31<sup>st</sup> May 2012 but had been established earlier by an Act of Parliament (Law No. 51/2010) promulgated on 10<sup>th</sup> January 2010. It is involved in the promotion of ADR both in the domestic and international spheres. It also facilitates training of ADR practitioners. The Centre has rapidly grown, and in only 6 years of operations it has administered over 108 disputes valued at over US\$ 40m. See [http://kiac.org.rw/IMG/pdf/kiac\\_annual\\_report\\_2017-2018.pdf](http://kiac.org.rw/IMG/pdf/kiac_annual_report_2017-2018.pdf) accessed on 8<sup>th</sup> April 2019.

<sup>943</sup> Located in Lagos, Nigeria offers both neutral appointment of dispute resolvers, administration and dispute management, and hosts other ADR institutions such as the CIArb (UK) Nigeria Branch, Lagos Chamber of Commerce International Arbitration Centre (LACIAC) and the Maritime Arbitration Association of Nigeria. It also offers training in ADR (Arbitration, Mediation and Conciliation). The LCA was established under a Lagos State Statute: The Lagos Court of Arbitration Law No. 17 of 2009 to provide institutionalised arbitration and ADR. It is a private sector driven body independent of state control. See <<https://www.lca.org.ng/about/>> accessed on 8<sup>th</sup> April, 2019.

<sup>944</sup> NCIA was established in 2013 by an Act of the Kenyan Parliament, NCIA Arbitration Act No. 26 of 2013, for purposes of promoting of international commercial Arbitration and other forms of ADR. It is mandated to offer training, administer both domestic and international Arbitration, and develop a national policy on ADR. The Centre has so far dealt with about 20 disputes valued at over 20 million US Dollars; in a period of less than 3 years of full operation. See, <<https://www.ncia.or.ke/our-services/>> accessed on 8<sup>th</sup> April 2019. For an analysis of the NCIA Act 2013 see, generally, WA Mutubwa, “The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013” (2016) 82(2) *The International Journal of Arbitration, Mediation and Dispute Management* 82 Issue, 135-145.

(AfAA),<sup>945</sup> the OHADA Common Court of Justice and Arbitration (CCJA),<sup>946</sup> the Arbitration Tribunal of ECOWAS (AT),<sup>947</sup> the COMESA Court of Justice and EACJ which incorporate arbitration jurisdiction in the respective Courts' Architecture.<sup>948</sup>

Most of these arbitration institutions are private-sector driven while some are either set up or supported by government. Despite this difference, the common problems suffered by most of these centres include: lack of financial and material resources, equipment, personnel, and technical capacity.<sup>949</sup> The CRCICA, NCIA, OHADA CJA and the KIAC have, however, shown resilience and a will to prosper. This is, perhaps, attributable to state support (including funding). As a result, these centres have demonstrated impressive results and remarkable organisation, competence and independence, which factors have in turn won over investor confidence.<sup>950</sup>

Most, if not all, African international arbitration centres suffer similar bottlenecks. Firstly, there are the general uncoordinated efforts towards promotion of regional centres, with each geographical sub-region having established its own arbitration centre.<sup>951</sup> This has translated into a

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<sup>945</sup> AfAA was established in June 2018 and is hosted in Kigali, Rwanda. It is a membership organisation consisting both individual leading African Arbitrators and arbitration Institutions. Its role is to support the development of international arbitration in Africa and to promote its members and their activities in international dispute resolution. See <https://afaa.ngo/page-18071> accessed on 8<sup>th</sup> April 2019.

<sup>946</sup> For a discussion on the arbitral jurisdiction and structure of the OHADA CCJA see Chapter Three of this thesis.

<sup>947</sup> The ECOWAS Court currently bears the arbitration jurisdiction pending the formal establishment of the ECOWAS Arbitration Tribunal. See Article 3(5) of the ECOWAS Supplementary Protocol on the Community Court of Justice.

<sup>948</sup> See Chapter Three of thesis on the arbitral jurisdiction of the COMESA Court of Justice and EACJ.

<sup>949</sup> EN Torgbor, (n) 936, 114.

<sup>950</sup> *ibid*, 115. CRCICA, for example, is a leading arbitration centre in North Africa-Arab-Middle East region and was recognised as the Regional Institution of 2013 by the Global Arbitration Review. Torgbor notes that Government support in setting up the Kigali and Cairo Centres not only facilitated the Centres' growth but ensured that the Centres had adequate facilities and references necessary for them to operate.

<sup>951</sup> C Namachanja, "The Challenges facing Arbitral Institutions in Africa" (2015) 3(2) *Alternative Dispute Resolution* 138-169, 148.

low volume of references to the institutions and most are without significant international caseloads.<sup>952</sup>

The second issue is the problem of language barrier. Ideally, language should not be a barrier to effective dispute settlement, especially in the age of technological advancements, where the world is now regarded as a global village. However, in practical terms the continent is still divided into sub-regions with legal preferences drawn along the lines of the languages of the states' erstwhile colonial masters. Some arbitration institutions operate only in French speaking countries. Parties from such states are unlikely to, therefore, refer disputes to institutions which conduct arbitrations exclusively in English. For example, CRCICA in Egypt only administers cases in English and Arabic, it neither handles nor avails arbitral rules and proceedings in French.<sup>953</sup> Similarly, the OHADA CCJA in Cote d'Ivoire only accepts French as the language of arbitration, thereby posing challenges to English speaking parties.<sup>954</sup>

Thirdly, the public or investors' low confidence in African arbitral institutions also reflects on the region's arbitral institutions. It has been observed that African states prefer referring disputes to arbitration centres in Europe and appointing arbitrators based in European capitals.<sup>955</sup> Statistics from the ICSID paint this grim picture more clearly. Out of all the arbitrations recorded by ICSID since its inception in 1972, cases involving sub-Saharan African countries represent 15%

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<sup>952</sup>ibid, 149. See also, Finizio and Fuhrich, "Africa's Advance" (2014) *Expert view: Surveying Africa (Commercial Dispute Resolution)* 27-29.

<sup>953</sup>W Jahnel, "Assessment Report of Arbitration Centres in Cote d'Ivoire, Egypt and Mauritius" (2014) *African Development Bank* [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment\\_Report\\_of\\_arbitration\\_centres\\_in\\_C%C3%B4te\\_d%E2%80%99Ivoire\\_Egypt\\_and\\_Mauritius.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%C3%B4te_d%E2%80%99Ivoire_Egypt_and_Mauritius.pdf) accessed on 8<sup>th</sup> April, 2019, 47.

<sup>954</sup>ibid. Fagbayibo observes that within the Francophone dominated OHADA, tensions between English and French speaking states exist. A practical example of the effect of this tension is seen in the case of Cameroon. According to Article 1 of the Constitution of Cameroon, French and English are the official languages of the state. However due to the dominance of French speaking countries in the OHADA, there has been resistance in accepting the OHADA uniform Acts in the English Speaking provinces of Cameroon. See, Fagbayibo, (n) 531, 317.

<sup>955</sup>C Namachanja, (n) 951, 152.

of the Court's entire Caseload.<sup>956</sup> Yet, only a partly 2% African arbitrators were appointed by the parties in the period.<sup>957</sup>

The statistics on international arbitration paint a disturbing picture of the African continent. There is, therefore, a need to grow investor and commercial arbitration from the roots. The beginning point would be to focus on intra-African multilateral and bilateral trade and investment arbitration as a launching pad into transcontinental arbitration. The AfCFTA and AEC, therefore, become important tools in this regard.

Fourthly, African arbitral institutions are facing competition from more established arbitration seats such as London and its London Court of International Arbitration (LCIA) as well as Paris with its International Chamber of Commerce (ICC) Court of Arbitration. The two are the most popular venues for resolution of investment disputes, and are often preferred by investors and states, including African states. These centres have existed for over a century and have gained unparalleled reputation as centres of excellence in commercial dispute resolution, with the necessary expertise, culture and experience.<sup>958</sup> African centres are still nascent, most are hardly 10 years old with the oldest being no more than 20 years old.<sup>959</sup> African investment arbitration centres are therefore still playing catch up in this arena, and so are African Arbitrators. As Torgbor pointedly put it:

Now is the time for Africa to be more visible, confident and assertive in the world of arbitration. If we meet the challenge, disputes emanating from Africa may still continue to be submitted to arbitration under the auspices of international arbitration organisations, but

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<sup>956</sup>ICSID web statistics 2019

<[https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf)> accessed on 8<sup>th</sup> April 2019.

<sup>957</sup>ibid.

<sup>958</sup> The LCIA was set up in 1883, 135 years ago. The ICC Court of Arbitration was established in the year 1923, over 96 years ago. See, <<https://www.lcia.org/>> and <<https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/>> accessed on 24<sup>th</sup> September 2019.

<sup>959</sup> See notes 938-950 above. The oldest African Arbitration Centre is about 40 years old (CRCICA) while the youngest is hardly two years old (AFAA).



at the same time African disputes will increasingly be heard in Africa by African arbitrators.<sup>960</sup>

The fifth impediment to the growth of investment arbitration in Africa has been identified as political uncertainty. Many African countries have an unfavourable political environment.<sup>961</sup> Disputants generally favour politically stable countries as seats of arbitration.<sup>962</sup> Parties to large transnational disputes would prefer arbitral institutions in politically stable countries to administer the process because such countries offer greater certainty in the efficient conduct of the proceedings.<sup>963</sup>

Africa has had its own share of experience in political instability, which has in turn diverted the attention of parties in international arbitration away from the continent. Civil unrest in the aftermath of the 2011 Middle East and North Africa (MENA) uprising (the Arab spring) affected countries such as Egypt and Libya. This became a major dissuading factor leading disputant to resorting to European countries with more established arbitration institutions away from the region's arbitration centre.<sup>964</sup> Threats of government destabilisation, coups, extremist action and civil disorder dissuade any well-meaning investor from African arbitration centres. Conversely, certainty, safety and political stability would draw disputants to African seats of arbitration.<sup>965</sup>

The problem of political uncertainty is not unique to Africa. Developing countries from other continents also experience political instability and civil unrest. For example, Namachanja observes that in Latin America, there is significant pressure from parties to appoint European

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<sup>960</sup> Torgbor, (n) 936, 121.

<sup>961</sup> C Namachanja, (n) 951, 153.

<sup>962</sup> *ibid.*

<sup>963</sup> K Sarkodie, "International Arbitration in the Sub-Saharan African Countries" (2014) *Mayer Brown* <<https://www.mayerbrown.com/en/perspectives-events/publications/2017/02/international-arbitration-in-sub-saharan-africa>> accessed on 6<sup>th</sup> April, 2019, 1.

<sup>964</sup> S Finizio and A Skeirka (2015) "Arbitration in the Shadow of old Empires" (2015) *Wilmer Hale* <<https://www.wilmerhale.com/en/insights/publications/arbitration-in-the-shadow-of-old-empires>> accessed on 6<sup>th</sup> April, 2019, 4.

<sup>965</sup> C Namachanja, (n) 951, 154.

arbitrators to handle matters at the expense of local arbitrators due to instability in the region.<sup>966</sup> Belloul captures this concern in the following terms:

Political uncertainty may well be the benchmark that makes people cautious, especially if they have been bitten once before in a number of jurisdictions... Countries with stronger institutions, legal certainty and better economic performance... are attracting more and more capital.<sup>967</sup>

The sixth problem affecting the growth of investment arbitration in Africa is the perception of corruption and government interference in judicial and arbitral matters. The 2018 Transparency International (TI) corruption perception index indicts most African Nations.<sup>968</sup> African countries have also been blamed for interference with judicial independence of Court's or *quasi-judicial* organs.<sup>969</sup> These perceptions pose a great threat to investment arbitration on the continent.

African countries set up arbitration centres, whether individually or as a group of countries in a region but proceed to populate the tribunals with state appointees. Two examples will help illustrate this point. The NCIA is a government body established by statute in Kenya, yet most of its leadership is drawn from government appointees.<sup>970</sup> The EACJ, ECOWAS and COMESA

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<sup>966</sup>ibid, 153.

<sup>967</sup>D Belloul, "Arbitration Migration" (2014) *International Arbitration* 53-55, 54.

<sup>968</sup>According to the 2018 TI Corruption Perceptions index, most African Countries lie in the bottom half of the ranking and are classified as being perceived "Highly Corrupt" <<https://www.transparency.org/cpi2018>> accessed on 8<sup>th</sup> April 2019.

<sup>969</sup> The World Economic Forum Report 2018 on judicial independence ranks only 4 sub-Saharan countries in the top 50, of the 137 countries surveyed, as having independent judiciaries. The Report is available at [http://reports.weforum.org/pdf/gci-2017-2018-scorecard/WEF\\_GCI\\_2017\\_2018\\_Scorecard\\_EOSQ144.pdf](http://reports.weforum.org/pdf/gci-2017-2018-scorecard/WEF_GCI_2017_2018_Scorecard_EOSQ144.pdf). Accessed on 23rd September 2019.

<sup>970</sup> Under Section 6(1) of the NCIA Act, 2013, the board of the Centre is appointed by the Attorney General of the Republic of Kenya on the recommendation of various bodies including the Law Society of Kenya (LSK) and the Chartered Institute of Arbitrators (CIArb) Kenya Branch. The Board in turn appoints members of the arbitral Court. It is unlikely in practise, therefore that one would be appointed to the board or court of the NCIA if the Attorney General, himself an appointee of the President of the Republic, does not agree with the recommendation. For a critique of the NCIA Court and its effect on the centre's independence, See W Mutubwa, "The Making of an Arbitration Hub:

Courts of Justice have arbitration mandates, which mandates are to be exercised by Judges of the respective Courts, who are all appointees of Heads of State and Government of the member states.<sup>971</sup> This approach invariably erodes the confidence of foreign investors in the arbitral institutions. Coupled with the negative attitude of domestic courts towards arbitration, and the general aversion of African states towards independent judicial or arbitral institutions, the state of investment arbitration through regional bodies seems less than impressive.

Torgbor sums up the problems associated with the proliferation and fragmentation of African regional arbitration centres as follows:

While these centres and institutions are indicators of continental progress and achievement in the management and administration of dispute resolution with varying degrees of success, we must be mindful that proliferation of institutions is not akin or tantamount to progress or excellence in operations or service delivery. On the contrary, proliferation is often accompanied by fragmentation, staff shortage, inadequate professional performance and poor service delivery. The proliferation of institutions with sub-standard and carefree orientations or whose only justification for existence is the business of seeking new members and sustenance from membership subscription fees will not be a rewarding trend for African users.<sup>972</sup>

It is against the foregoing backdrop that the AfCFTA dispute settlement system should be seen. The AfCFTA dispute settlement system includes a provision for arbitration.<sup>973</sup> The expectation is that as the continent harmonises and consolidates its trade and investment regulation through the AfCFTA and ultimately the AEC, the investment dispute settlement system will also

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A critical Appraisal of the Nairobi Centre for International Arbitration Act, 2013” (2015) *The International Journal of Arbitration, Mediation and Dispute Management* 135-145, 139-140.

<sup>971</sup>Article 32 of the EAC Treaty; Article 11(2) of the ECOWAS Court Supplementary Protocol; and Article 28 of the COMESA Treaty.

<sup>972</sup>EN Torgbor, (n) 936, 116.

<sup>973</sup>Article 27 of the AfCFTA Protocol on Rules and Procedures on the settlement of Disputes. See Chapter Three of this thesis for a detailed analysis of the dispute resolution mechanisms under the AfCFTA.

be re-aligned and consolidated under an overarching continental arbitration mechanism. This is in order to avoid duplicity, proliferation and fragmentation, and its attendant problems. Proposals and recommendations on how this can be achieved will be made in the next chapter of this thesis.

### ***5.3.3 Proliferation and Fragmentation of Investment Codes in Africa***

Closely related to international investment arbitration is the viability of the various investment codes conceived and promulgated on the continent. Investment codes are meant to be blueprints for spurring economic activities through strategies that encourage foreign direct investment within the member states who subscribe to these codes. International arbitration is the most preferred mode of settling international commercial and investor-state disputes, hence the co-relation.

The EAC, SADC, ECOWAS and COMESA all have Investment Codes, Acts or Protocols.<sup>974</sup> The objective of these codes and protocols is to harmonise member states' investment policies and laws in alignment with the common regional codes. For example, Article 19, Annex 1 of the SADC Protocol on Finance and Investment (SADC-FIP) enjoins member states to harmonise their investment policies, laws and practices with the objective of creating a SADC investment zone.<sup>975</sup> To this end, Article 2 of the SADC-FIP elaborately provides that one of the key objectives of the Protocol is:

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<sup>974</sup>The EAC has a model Investment Treaty concluded in 2016

<<https://www.eac.int/documents/category/investment-promotion-private-sector-development>> accessed on 6th April, 2019; ECOWAS has a Supplementary Act on Investments (supplementary Act A/SA 3/12/08; <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments>> accessed on 6th April, 2019. COMESA has a Common Investment Agreement, <<https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf>> accessed on 6th April, 2019. SADC has the SADC Finance and Investment Protocol (FIP), available at <[https://www.sadc.int/files/4213/5332/6872/Protocol\\_on\\_Finance\\_Investment2006.pdf](https://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf)> accessed on 6<sup>th</sup> April, 2019.

<sup>975</sup> The SADC-FIP discussed in detail in L Ngoben and B Fagbayibo, "The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and Opportunities for effective Harmonisation" (2015) 19 *Journal of Law and Development* 175-191.

Harmonisation of the financial and investment policies of the state parties in order to make them consistent with the objectives of SADC and ensure that any change to financial and investment policies in the state party do not necessitate undesirable adjustments in other state parties.

Several issues arise with respect to the proliferation of investment codes in Africa. The first and most obvious one, is that most member states of African RECs also have domestic investment laws and policies. Some of these are inconsistent with or in direct conflict with the regional codes or policies. For example, Mhlongo notes that the scope of definition, and exceptions, of “an investment” in the SADC-FIP and South Africa’s Protection Investment Act 22 of 2015 are capable of multiple interpretations.<sup>976</sup> This is primarily with respect to the following cardinal principles of investment law: the right of establishment of investment,<sup>977</sup> fair and equitable treatment,<sup>978</sup> and legal protection of investment.<sup>979</sup>

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<sup>976</sup>L Mhlongo, “A Critical Analysis of the Protection of Investment Act 22 of 2015” (2019) Forthcoming in *South Africa Public Law Journal* 1-25, at 8-18.

<sup>977</sup>L Mhlongo observes that Section 7 of the South African Protection of Investment Act provides that all investments must be established in compliance with the laws of South Africa. However, section 7(2) of the Act does not, however, create a right for a foreign investor or prospective investor to establish an investment in South Africa. While the State retains the sovereign right to regulate investments in its territory, general international law on foreign investment places obligations on states not to place unreasonable restrictions to foreign investment. Article 2(3) of the SADC FIP, in line with this general principle, prohibits member states from amending or modifying, without good reasons, or arbitrarily, the terms, conditions and any benefit specified in the code. See L Mhlongo, *ibid*, 10-11.

<sup>978</sup> While both the South African Investment Act and Annexure 1 of the SADC FIP provide for the National Treatment Standard (NTS), they do not directly provide for the Most Favoured Nation (MFN). Article 6 of the Annexure 1 of the SADC FIP provides that investors “shall enjoy fair and equitable treatment in the territory of any member state”, on the other hand, South Africa’s Investments Act requires that administrative, legislative and judicial process do not operate in a matter that is arbitrary or that denies administrative and procedural justice to an investor, L Mhlongo, *ibid*, 11.

<sup>979</sup> L Mhlongo underscores that section 2 of the Constitution of South Africa affirms its supremacy. This means that, in South Africa, the validity of international law is not measured against the rules of international customary law, but by the Constitution. As a result, she further observes, it will be difficult for foreign investors to invoke international investment law which may be seen to offend the South African Constitution. See, L Mhlongo, *ibid*, 13.

The second problem is one associated with the multiple memberships by African countries of RECs with similar objectives. For instance, all the COMESA member states are either members of EAC or SADC.<sup>980</sup> All member states of SADC and EAC are also members of the TFTA, while Tanzania is a member of both SADC and EAC and is, therefore, subject to both the SADC-FIP and EAC Investment Code. All these regional organisations promote economic regionalism with very similar objectives, including the desire for a common investment policy throughout their respective regions. This leads to the problem of states being required to adopt several codes and protocols on the same subject and sometimes with conflicting objectives and provisions.

#### ***5.3.4 The Possible role of the PAIC in redressing Fragmentation of Investment Codes in Africa***

According to UNCTAD, 99 investor – state dispute claims have been filed against African States since 1987.<sup>981</sup> In most of these cases, African states have lost and been ordered to pay huge compensatory damages.<sup>982</sup> African countries have in turn raised several concerns about the traditional ISDS system, including the lack of legitimacy and transparency, exorbitant costs, and inconsistent and flawed awards.<sup>983</sup>

In response to what they view as a system skewed against them, African countries have either attempted to backtrack from ISDS Treaty obligations, or to establish their own ISDS

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<sup>980</sup>M Kane, “The Pan African Investment Code: A good First Step, but more is Needed” (2018) *Perspectives on Tropical Foreign Direct Investment Issues* (Columbia Centre on Sustainable Investment) 1–3, 1. <<http://ccsi.columbia.edu/files/2016/10/No-217-Kane-FINAL.pdf>> accessed on 23rd September 2019.

<sup>981</sup>Investment Policy Hub <<https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>> accessed on 7<sup>th</sup> April 2019.

<sup>982</sup>ibid. See also World Bank <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed on 7<sup>th</sup> April 2019.

<sup>983</sup>T Chidede, “Investor – State Dispute Settlement in Africa and the AfCFTA Investment Protocol” (2018) at p.1-2. <<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed on 7<sup>th</sup> April 2019. See, for example the key findings and recommendations of South Africa in G de Carvalho “At the Table or on the Menu? Africa’s Agency and the Global Order” (2019) Institute for Security Studies available at <https://issafrica.org/research/africa-report/at-the-table-or-on-the-menu-africas-agency-and-the-global-order> accessed on 20<sup>th</sup> November 2019.

systems. Tanzania, for example, has enacted legislation that requires the use of domestic courts as the forum for ISDS to the exclusion of international arbitration.<sup>984</sup> The South African Protection of Investment Act, 2015 and the SADC FIP now require exhaustion of local remedies before engaging in international arbitration, be it under the UNCITRAL Rules or ICSID.<sup>985</sup>

While concerns over the ISDS system are not confined to Africa, most African countries are still parties to, and still conclude, BITs (with other African countries or external partners) which prescribe ICSID, UNCITRAL, ICC, ICA, LCA, PCA and LCIA as the ISDS fora.

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<sup>984</sup> In 2014, Tanzania was identified as a top destination for foreign direct investment in East Africa by UNCTAD. However, since the new government came into power in 2017, the Country has developed a rather combative stance towards foreign investment, particularly in the natural resources sector. Three controversial pieces of legislation have since been passed, namely: the Written Laws (Miscellaneous Amendments) Act 2017; the National Wealth and Resources (Permanent Sovereignty) Act 2017 and the National Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act 2017. Under Section 6(2) of the Review and Renegotiation of Unconscionable Terms Act provides that a contract that contains a clause that subjects the “state to the jurisdiction of foreign law and fora” is “deemed to be unconscionable.” Under the new law, reference to “foreign fora” such as international ISDS arbitration relating to the Tanzanian government may, therefore, be unconscionable. Section 11 of the Permanent Sovereignty Act prohibits international dispute resolution mechanisms or any court or tribunal from exercising jurisdiction over extraction, exploitation or acquisition and use of natural wealth and resources. Jurisdiction is reserved for the domestic Tanzanian judicial or other bodies, established under Tanzanian law. Section 22 of the Public – Private Partnership (Amendment) Act, No. 9 of 2018 prohibits international arbitration and instead prescribes “mediation or arbitration adjudicated by judicial bodies or other organs established in Tanzania and in accordance with its laws”. For a detailed discussion on the effect of these statutory amendments on FDI in Tanzania, see, M Masamba, “Government Regulatory Space in the Shadow of BITs: Tanzania’s Natural Resources Regulatory Review” (2017) <<https://www.iisd.org/itn/2017/12/21/governmentregulatory-space-in-the-shadow-of-bits-the-case-of-tanzanias-natural-resource-regulatory-reform-magalie-masamba/>> accessed on 7<sup>th</sup> April 2019.

<sup>985</sup> L Mhlongo, (n) 976, 17. Ngobeni and Fagbayibo, note 975 above, at p. 176. The South African Minister of Trade and Industry, a strong proponent of the Protection of Investment Act, argues that doing away with international arbitration will increase the protection of investors and the economy. He further states that because of the long line of precedents on similar disputes domestically, and its rich heritage, the South African Judiciary is better placed in ensuring protection of investors through consistent and, therefore, predictable decisions. See, <https://www.economywatch.com/features/south-africa-cancelling-foreign-investment.02-01.html> accessed on 7<sup>th</sup> April, 2019.

There is, however, a discernible shift towards a regional and sub-regional focus in ISDS in Africa. For example, the SADC FIP and ECOWAS Supplementary Investment Act do not provide a specific ISDS forum but they make provisions for investors to use local remedies.<sup>986</sup> The EAC Model Investment Code prescribes mediation and investment Arbitration as the preferred state-state, and state-investor dispute settlement mechanism.<sup>987</sup> The COMESA Common Investment Agreement incorporates ISDS arbitration through the COMESA Court of Justice, Africa arbitration centres, as well as ICSID and UNCITRAL arbitral tribunals.<sup>988</sup> The greatest challenge is that African countries belong to more than one REC and are, therefore, obliged to subscribe to different sub-regional ISDS with different approaches, including whether or not to exhaust local remedies before resorting to the regional mechanism.

This is where the PAIC becomes useful. While the PAIC is not a panacea to all the problems afflicting ISDS in Africa, it substantially responds to most of the current concerns surrounding the subject. First, the PAIC provides for arbitration through African arbitration institutions governed by UNCITRAL Arbitration Rules, with the consent of the parties.<sup>989</sup> This, at least, eliminates the different approaches African states have taken on ISDS when concluding BITs among themselves.

Secondly, a dispute settlement that is predictable, independent and allows investors to enforce their rights remains crucial for foreign investors.<sup>990</sup> Legal certainty and respect for the rule of law is a non-negotiable minimum for an investor seeking to invest in a country. The AfCFTA investment protocol should expand to include disputes by individuals and not only inter-state

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<sup>986</sup> T Chidede, (n) 983, 2.

<sup>987</sup> Article 23 of The EAC Model Investment Code (2016). The Arbitration is to be conducted under the ICSID Convention and Rules, UNCITRAL Rules, the ICSID additional Facility Rules; or EACJ.

<sup>988</sup> The Amended COMESA Common and Investment Agreement, 2017. Articles 26, 27 and 28.

<sup>989</sup> Chapter 6. The 2016 Draft Treaty is available at [https://au.int/sites/default/files/documents/32844-doc-draft\\_pan-african\\_investment\\_code\\_december\\_2016\\_en.pdf](https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf). Accessed on 7<sup>th</sup> April 2019.

<sup>990</sup> T Chidede, (n) 983, 3.



disputes.<sup>991</sup> This access to ISDS should include non-African investors, otherwise disputes between such investors and African states will still be hosted in European capitals.

Like the COMESA Investment Agreement and the EAC approach, the PAIC should cascade its ISDS system through the sub-regional judicial organs. A harmonisation of the various sub-regional codes will be crucial in achieving this end. To overcome the perception that most African domestic courts lack impartiality and independence from their governments, the PAIC should provide for a waiver of the rule for mandatory exhaustion of local remedies, where it can be shown that it is either impossible or unnecessarily obstructive to procure its compliance.

It is in light of the problems discussed in the preceding part of this chapter that the PAIC becomes an important tool in the quest for harmonisation of investment codes and protocols throughout Africa. The PAIC was primarily formulated as a tool to promote harmony in the investment strategy in Africa. Kane observes that the PAIC was developed by African experts and welcomed by policy makers:

as an opportunity to contribute to African industrial and structural transformation through a binding instrument that would effectively restore the balance between investors' rights and host states' obligations, take into account countries' sustainable development objectives, streamline the investor-state dispute settlement system (ISDS), and finally, overcome issues with the fragmentation of the international investment regime, due to the multiplicity of investment treaties and the diverse interpretive practice of arbitral tribunals.<sup>992</sup>

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<sup>991</sup>Article 28 of the AfCFTA Agreement restricts access to the dispute resolution mechanisms to state parties. Article 1 of the Protocol on Rules and Procedures on the settlement of Disputes defines "Complaining Party", "Dispute", "Party to a dispute" and "third Party" as state Parties to the Protocol, thus leaving no room for natural and corporate individuals. Article 5 as read with Article 6, of the Protocol, also provide that the Dispute Settlement Body (AfCFTA DSB) is only accessible by state parties.

<sup>992</sup>M Kane, (n) 980, 1.

Kane notes that in the course of negotiating the code, the original ambition of having a binding investment code to replace intra-African agreements was abandoned in favour of a “guiding text.”<sup>993</sup> According to Kane, this choice of a soft law instrument will exacerbate the fragmentation of the investment law regime in Africa and, hence, impair one of the code’s core objectives, that of the harmonisation of investment policy and regulation across the continent.<sup>994</sup> Furthermore, he notes, that the benefit of not including the controversial fair and equitable-treatment provisions in the code, on the one hand, and excluding dispute settlement procedures from the scope of the Most Favoured National (MFN) Clause, on the other hand, is a vexing limitation particularly in the absence of a binding text.<sup>995</sup> As the PAIC code loses its treaty character, there is no guarantee that these two provisions will not be re-introduced in new bilateral investment treaties negotiated by African countries.<sup>996</sup>

Ngobeni perceives the failure to include a post-termination survival clause in the draft PAIC as a fundamental weakness thereof.<sup>997</sup> Such clauses are meant to protect investors for a reasonable period after the termination of an investment agreement.<sup>998</sup> He also views the creation of double standards, with a lower protection threshold for intra-African investors, as discriminative.<sup>999</sup> Since the PAIC provides for dispute resolution at the national level, Ngobeni rightly advocates for harmonisation of the multifarious approaches in domestic investor

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<sup>993</sup>M Kane, *ibid.* Article 3 of the Code contemplates a non-binding instrument. The text of the Code is available at <<https://au.int/en/documents/20161231/pan-african-investment-code-paic>> accessed on 6<sup>th</sup> April, 2019.

<sup>994</sup>*ibid.*, 2.

<sup>995</sup>*ibid.*

<sup>996</sup>*ibid.*

<sup>997</sup>L Ngobeni, (n) 446, [2].

<sup>998</sup>*ibid.*, L Ngobeni notes, for example, that the South Africa – Mozambique BIT has a 10-year post-termination survival.

<sup>999</sup>*ibid.*, [6]. He further notes that this may encourage forum shopping by intra-African investors seeking establishment of their entities outside Africa so that they can benefit from favourable protection of their investments.

protection.<sup>1000</sup> The non-binding effect of the PIAC also presents a patent weakness since African states generally ignore model or soft laws.<sup>1001</sup>

Although the PAIC itself is not without normative and structural weakness, it offers a beginning point for discussion on the harmonisation and consolidation of continental investment policies and ISDS.

The harmonisation of RECs under the AU and the shift towards continental economic regionalism offers real motivation for the adoption of the PAIC by all AU member states. The first step, and perhaps the clearest sign of Africa's move towards continental economic regionalism, was seen in the establishment of the TFTA in 2015.<sup>1002</sup> The TFTA Agreement advocates for the harmonising of programmes and policies within and between the three merging RECs.<sup>1003</sup> The Agreement, in Article 36, also contemplates the conclusion of an investment protocol. Article 14 of the TFTA Agreement also requires members to design and standardise their trade and customs, documentation and information in accordance with internationally accepted standards. The AfCFTA Agreement also provides for an investment protocol, which will be finalised by 2020.<sup>1004</sup> According to Ngobeni, this protocol will render the PAIC worthless.<sup>1005</sup> Sub-regional protocols and codes generally seek to replace or harmonise domestic investment laws. It is, therefore, imperative that continental integration efforts under the AfCFTA, PAIC and AEC should proceed and harmonise investment protocols across Africa so as to further ease intra-Africa and foreign investment without the current fragmentation.<sup>1006</sup> The preferred design of the proposed PAIC is elaborated in the next chapter of this thesis

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<sup>1000</sup> For example, he argues that since PAIC does not guarantee access to international arbitration, while most BIT do. The indecisiveness on the choice of forum for dispute resolution is therefore viewed as a weak link. L Ngobeni, *ibid*, [2].

<sup>1001</sup> *ibid*.

<sup>1002</sup> A detailed discussion of the TFTA Agreement is made in chapter 2 of this thesis.

<sup>1003</sup> Article 4 and 5 of the TFTA Agreement.

<sup>1004</sup> Article 4 and 7 of the AfCFTA Agreement.

<sup>1005</sup> L Ngobeni, (n) 985 [7].

<sup>1006</sup> *ibid* [5 and 9].

#### 5.4. Development of International law at the Regional Level: A Panacea to Fragmentation on the Continent?

Regionalism has been defined variously including, as “the pursuit of geographical exceptions to universal international law rules.”<sup>1007</sup> It, therefore, connotes a rule or principle with a regional sphere of validity or a regional limitation to the sphere of validity of a universal rule or principle.<sup>1008</sup> It is an exclusionary rather than inclusionary approach to international relations. The rules or principles of the organisation are binding only on states identified as members of a particular region or organisation.<sup>1009</sup> According to Schindler, the negative sense of regionalism is that it would exempt states within a certain geographical area from the binding force of an otherwise universal rule or principle.<sup>1010</sup>

Regional integration has influenced international law sociologically, culturally and politically.<sup>1011</sup> These influences are said to remain significant historical and cultural sources of international law.<sup>1012</sup> However, international law by its very nature is an effort to cut across cultures and borders to establish global or transnational regulation. There is, therefore, a strong sense that international law should be read through a universal lens. Jennings, for example, points out that:

...the first and essential principle of public international law is its quality of universality; that is to say that it be recognised as valid and applicable in all countries whatever their cultural, economic, socio-political, or religious histories and traditions.<sup>1013</sup>

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<sup>1007</sup> Koskenniemi Report, (n) 847, 108.

<sup>1008</sup> This understanding of regionalism is theorised, for example, by D Schneider, “Regional International law” in BB Rudolf (ed), *Encyclopaedia of International Law* (Vol. IV Elsevier Amsterdam 2000) 161-165, 161.

<sup>1009</sup> *ibid.*

<sup>1010</sup> *ibid.*

<sup>1011</sup> Koskenniemi Report, (n) 847, 104.

<sup>1012</sup> RP Anand, “The Role of Asian States in the Development of International law” in RJ Dupuy (ed), *The Future of International law in a Multicultural World* (Nijhoff The Hague 1983) 105.

<sup>1013</sup> R Jennings (1998) “Universal International Law in a Multicultural World” Maarten Bos & Ian Brownlie, *Liber Amicorum for Lord Wilberforce* (Oxford University Press Oxford 1998) and in *Collected Essays of Sir Robert Jennings* (Kluwer The Hague 1998) 341.

Yet, Jennings also acknowledges that international law can be modified to fit local circumstances. He aptly acknowledges the versatility of regional international law, as follows:

...this is not to say, of course, that there is no reason for regional variation, perhaps even in matters of principle... universality does not mean uniformity. It does mean, however, that such a regional law, however variant, is part of the system as a whole, and not a separate system, and it ultimately derives its validity from the system as a whole.<sup>1014</sup>

At critical historical epochs that shaped the discourse on integration, influential leaders have been faced with the choice between universality and regionalism. On most occasions regionalism has always found favour over universality. As the creation of the UN was being debated between the “Great Powers” at the end of the Second World War, the choice between regionalism and universality weighed heavily on the planning of the post-war collective security system.<sup>1015</sup> Winston Churchill, the then UK Prime Minister, for example, originally preferred a set of regional systems with “a Council of Europe and a Council of Africa under the common roof of the world organisation.”<sup>1016</sup> Robert Schuman, the then French Prime Minister, instrumental for the realisation of the EU as we know it today, led the European movement through his lectures and addresses across Europe that resulted in the establishment of the ECSC.<sup>1017</sup>

On the African Continent, although taking different approaches, the founding fathers of the OAU, Nkrumah and Nyerere, preferred regionalism over universalism. Nkrumah preferred a

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<sup>1014</sup>ibid, 342.

<sup>1015</sup> Koskenniemi Report, (n) 847, 102.

<sup>1016</sup>Cited in WG Grewe, “The History of the United Nations” in B Sinima (ed), *The Charter of the United Nations. A Commentary* (Oxford University Press Oxford 1995) 7.

<sup>1017</sup> What is commonly referred to so as the Schuman Plan which began with the 9<sup>th</sup> May 1950 Schuman declaration. The Plan was primarily to integrate Europe through a joint steel and coal production and marketing organisation. For an analysis of the evolution of the EU following the Schuman plan see uni.lu “From the Schuman plan to the Paris Treaty” (1950-1952) <<https://www.cvce.eu/en/recherche/unit-content/-/unit/5cc6b004-33b7-4e44-b6db-f5f9e6c01023>> accessed on 1<sup>st</sup> April 2019.

continental supranational African government, while Nyerere preferred a step-wise approach to the continent's integration with priority being given to sub-regional organisations.<sup>1018</sup>

Regional organisations being privileged fora for international law-making are, therefore, ideal incubators of ideas for universal integration.<sup>1019</sup> Those who favour this view advance that international law should be developed in a regional context because the relative homogeneity of the interest or outlook of actors will ensure a more efficient or equitable implementation of the relevant norms.<sup>1020</sup> To this end Koskenniemi instructively notes that:

The presence of a thick cultural community better ensures the legitimacy of the regulations and that they are understood and applied in a coherent way. This is probably why human rights regimes and free trade regimes have always been commenced in a regional context despite the Universalist claims of ideas about human rights or commodity markets.<sup>1021</sup>

The traditional judicial approach in domestic courts has been to employ an appellate review mechanism, by higher or superior courts, in an effort to secure uniformity in the interpretation and application of the law. The Appellate approach is supported by formal or informal obligations to follow appellate decisions on the part of lower courts and possibly even by courts of equal status.<sup>1022</sup> This domestic law model is, however, largely unavailable on the international level. The relatively established CJEU, for example, has been able to achieve this through the principles of supremacy, use of the preliminary procedure, direct effect of its decisions; and exercise of appellate jurisdiction from national courts on community matters.<sup>1023</sup>

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<sup>1018</sup>See chapter 3.2.2 of this thesis on a detailed discussion of the philosophical underpinnings of post-colonial integration efforts under the now defunct OAU.

<sup>1019</sup> Koskenniemi Report, (n) 847, 106.

<sup>1020</sup>*ibid.*

<sup>1021</sup>*ibid.*

<sup>1022</sup> Reinisch, (n) 837, [17].

<sup>1023</sup>See the discussion on the CJEU and its jurisdiction in chapter 4 of this thesis and how the court employs the tools of preliminary rulings, direct-effect and appeals from national courts on community law so as to ensure consistency and coherence in the application and interpretation of EU community law

Except for very rare situations, there is hardly any system of appellate review in international law. International courts and tribunals are also almost routinely excluded from any form of binding precedence as it is known in common law jurisdictions.<sup>1024</sup> Although the tribunals, including the ICJ, routinely refer to their own previous decisions, there is no formal requirement for the Court to follow its precedents nor is there an obligation on other international courts or even domestic courts to follow or apply principles settled by the ICJ.<sup>1025</sup> The 1995 WTO Understanding on Rules and Procedures governing the Settlement of Disputes (WTO-DSU) has an Appellate Body (WTO-DSU-AB) to whom questions of law may be appealed from WTO panels.<sup>1026</sup> This procedure is said to be working so effectively that it has contributed to establishing a coherent body of WTO law.<sup>1027</sup> This appeal mechanism is, however, only limited to appeals from decisions of WTO panels and not from regional trade organisations or national courts.

This predicament is not unique to regional organisations as the ICJ has had to grapple with this problem. Rosenne observes that the UN Charter neither expressly nor impliedly provides for hierarchical relationship between the various judicial organs established under the auspices of the UN.<sup>1028</sup> The Charter does not also place limitations upon the powers of the organisation to establish regional or special judicial organisations.<sup>1029</sup> However, such bodies are not principal organs of the charter. The ICJ, therefore, remains the principal judicial organ of the UN.

The AfCFTA Agreement has substantially borrowed from, and largely adopted, the WTO dispute resolution approach.<sup>1030</sup> Since both the AfCFTA and AEC aim at consolidating economic regionalism in Africa into a continental, rather than fragmented sub-regional approaches, a

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<sup>1024</sup> Reinisch, (n) 837, 18.

<sup>1025</sup> *ibid.*

<sup>1026</sup> *ibid.*, [19].

<sup>1027</sup> *ibid.*

<sup>1028</sup> S I Rosenne, *The Law and the Practice of the International Court 1920-1996* (Vol 1 Martinus Nijhoff The Hague 1997) 110-114, 142

<sup>1029</sup> *ibid.* Chapter VIII of the UN Charter expressly recognises the right of its members to create and conclude Regional Arrangements.

<sup>1030</sup> See the AfCFTA on Rules and Procedures of the Settlement of Disputes. An elaborate discussion on the AfCFTA dispute resolution mechanisms is set out in chapter 3 of this thesis.

consolidation of the dispute settlement mechanisms will ultimately become necessary. An overarching continental court, such as the ACJ&HR sitting at the apex of the continental economic regionalism dispute resolution pyramid, will help achieve the coherence and consistency of norms on trade and investment law in Africa.

The role of an effective dispute settlement framework in the eventual success of the AfCFTA project cannot be overstated. Cofelice notes that AfCFTA's success will largely depend on the establishment of appropriate governance structures which promote harmonisation, consistency and predictability of its goals.<sup>1031</sup> It will, therefore, be useful if the AfCFTA's institutional architecture adopts a "multi-level" character, and be supported by sub-regional and national institutions.<sup>1032</sup> The AfCFTA's principal challenge will be its ability to rationalise and harmonise the different, and sometimes conflicting, regimes of African RECs within the time lines set in the AfCFTA Agreement.<sup>1033</sup>

From the foregoing discussion, it is appreciated that the current dispute settlement model adopted by the AfCFTA is exclusively intergovernmental. Cofelice proposes a dispute resolution framework which is mandatory and binding on member states.<sup>1034</sup> The framework, he suggests, should also explicitly recognise the possibility of individuals to assert their rights under the Agreement.<sup>1035</sup> The complaints process should also include appeals from national courts and RECs, with the ACJ&HR as the apex court of last resort.<sup>1036</sup> This can be practically achieved through the establishment of a trade chamber of the ACJ&HR "with a view to creating positive synergies between trade law and human rights."<sup>1037</sup>

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<sup>1031</sup>A Cofelice, n 48, pp.32-35 at p.33.

<sup>1032</sup>*ibid*, 34

<sup>1033</sup>*ibid*, 33.

<sup>1034</sup>*ibid*, 34.

<sup>1035</sup>*ibid*.

<sup>1036</sup>*ibid*.

<sup>1037</sup>*ibid*.



The choice of the WTO DSU as the template for the AfCFTA dispute settlement mechanism is a fundamental design flaw. Perhaps even a fatal flaw.<sup>1038</sup> Akinkugbe argues that the transplantation of the WTO system to the AfCFTA presents two main shortcomings.<sup>1039</sup> Firstly, is the general discontent with regional courts by member states of African RECs.<sup>1040</sup> Secondly, is the “highly legalised dispute settlement system” which makes it unattractive to African States.<sup>1041</sup> The WTO itself is undergoing an introspective evaluation.<sup>1042</sup> Makane describes the current debate around the WTO as “discussions” rather than “negotiations”.<sup>1043</sup> He suggests that Africa should come up with a strategy during this discussion phase that ensures that it takes a common position.<sup>1044</sup> In his view, to wait for the proper negotiation stage may be too late.<sup>1045</sup> The strategy should therefore focus on three critical areas of potential reform which includes the clarification on investment and its treatment, the ways in which the multilateral trading system can help combat global warming, and the concerns around the current dispute settlement system.<sup>1046</sup>

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<sup>1038</sup> Simo, (n) 611, [8-9], argues that the AfCFTA dispute settlement system risks being “a court without cases” partly because of its adoption of WTO model which is hardly used by African States.

<<http://www.afronomicslaw.org/2019/08/19/a-future-court-without-cases-on-the-question-of-standing-in-the-afcfta-dispute-settlement-mechanism/>> accessed on 30<sup>th</sup> September 2019.

<sup>1039</sup>O Akinkugbe, “Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment” (2019). <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3403745](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403745)> accessed on 30<sup>th</sup> September 2019, 11. See also, generally, J E Akinyi, “Evaluating the Conciliation Dispute Settlement Mechanism of the African Continental Free Trade Agreement through the lens of Timor-Leste Australia” (2019) <<http://www.afronomicslaw.org/2019/08/22/evaluating-the-conciliation-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement-through-the-lens-of-timor-leste-australia/>> accessed on 30<sup>th</sup> September 2019.

<sup>1040</sup>O Akinkugbe, (n) 1039, 11, 14-16.

<sup>1041</sup>ibid.

<sup>1042</sup> In fact, Simo suggests that the WTO is on the verge of collapsing, (n) 611 [3].

<sup>1043</sup>M Makane, “An African Response to WTO Reform Proposals” (2019) <<http://www.afronomicslaw.org/2019/09/03/an-african-response-to-wto-reform-proposals/>> accessed on 30<sup>th</sup> September 2019, [1].

<sup>1044</sup>ibid, [2].

<sup>1045</sup>ibid.

<sup>1046</sup>ibid, [3, 4, 5 and 6]. Makane argues that African states need to be more engaged with the current crisis of the WTO dispute settlement system. He cites the example of the tactics employed by the U.S.A in blocking appointments to the Appellate Body (AB), contrary to its express treaty obligations (Articles 17.1 and 17.2 of the DSU), which has had

Gathii's assessment of the AfCFTA Dispute Settlement Mechanism and his prescription for an effective continental dispute settlement system is instructive.<sup>1047</sup> The system must confront the perception that African states do not litigate against each other, hence they set up courts and dispute settlement systems which they plan to hardly use.<sup>1048</sup> Unlike the current AfCFTA Dispute Settlement Mechanism, the system should not encourage forum shopping through provisions that may be construed to confer non-exclusivity of jurisdiction.<sup>1049</sup> Most critically, according to Gathii, the system should define the relationship between the continental and sub-regional dispute settlement systems in an effort to avoid an overlap of mandates and forum shopping.<sup>1050</sup> These are some of the issues which the next section of this chapter seeks to address.

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WTO Members to sit up and take notice of its concerns in relation to the functioning of the AB. The concerns outlined by the United States in relation to the functioning of the AB, namely, (i) the 90-day issue; (ii) the Rule 15 issue; (iii) municipal law as fact issue; (iv) advisory opinion issue and the (v) precedent issue, appear to be in the nature of procedural objections. He also notes that the current lack of participation of African states in the WTO dispute settlement system is indicative, to an extent, of the discomfort that most African states feel towards the system. He urges that future reforms of the WTO DSU must necessarily include procedural and substantive aspects to render dispute settlement more flexible for African countries.

<sup>1047</sup>JT Gathii, "Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement" (2019) <<http://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/>> accessed on 30<sup>th</sup> September 2019.

<sup>1048</sup>ibid, [1]. See also, O Akinkugbe, "What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution" (2019). <<http://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/>> accessed on 30<sup>th</sup> September 2019 [4, 5 and 6].

<sup>1049</sup>JT Gathii, (n) 1047 [4]. While Gathii appreciates that non-state actors wish for other forms of dispute resolution apart from courts, the danger of multiple processes with overlapping competencies may undermine the integrity of the entire system. See also, O Akinkugbe, (n) 1048, 15, where he argues that the AfCFTA Dispute Settlement Mechanism should not be seen as an alternative dispute mechanism to sub-regional Dispute Settlement Mechanisms (DSMs). See also, the parallels drawn from the SADC dispute settlement system in A Saurombe, "An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States" (2011) 23 *South African Mercantile Law Journal* 392.

<sup>1050</sup>JT Gathii, (n) 1047, [7].

## 5.5. The ACJ&HR as a Unifying Factor against Differences in Legal Systems and Philosophies in Africa

Legal systems and philosophies in Africa are largely influenced by the colonial roots of states and political cultures that still remain firm decades after independence of all African States. The legal systems of countries across Africa vary from civil law, common law, Sharia law, Roman-Dutch law and hybrid jurisdictions.<sup>1051</sup> Due to the different origins of the legal systems, together with the legal-cultural differences ranging from Francophone, Anglophone and Lusophone backgrounds, arbitration, for example, takes diverse forms when international laws and principles are imported into each individual country.<sup>1052</sup> Sempasa describes the choice of international arbitration as an attempt to avoid these diversities:

Arbitration provides certain mechanisms of escape from substantive and procedural rules of municipal systems which foreign business scarcely understand and often consider as having very little relevance to the issues needing resolution.<sup>1053</sup>

Procedural aspects of law in civil law jurisdictions differ from those in common law regimes. For instance, disclosure, discovery and production of evidence in civil law systems is largely inquisitorial while common law favours an adversarial system.<sup>1054</sup> Common law

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<sup>1051</sup> C Albanese, “Ring of Diamonds: Africa’s Emerging Centres of Arbitration” (2015) *Africa Law and Business Global Legal Group*, <<https://www.africanlawbusiness.com/news/ring-of-diamonds-africas-emerging-centres-of-arbitration>> accessed on 1<sup>st</sup> April. 2019, 4.

<sup>1052</sup> M Rubino-Sammartano, *International Arbitration Law and Practice* (Kluwer Law International Netherlands 2001) 1.

<sup>1053</sup> SL Sempasa, “Obstacle to International Commercial Arbitration in African Countries” (1992) 41 *International and Comparative Law Quarterly* 2 (British Institute of International and Comparative law) 387-413, 388.

<sup>1054</sup> Shruti discusses the differences between adversarial and inquisitorial judicial processes and their value in discovery of evidence. He notes that the adversarial model is competitive and relies on precedents while the inquisitorial method is slant towards discovery of evidence by the tribunal, *suo moto*. R Shruti, “Adversarial verse Inquisitorial System: Error and Valuation” (2017) 12(51) in De Gruyter (ed), *Journal of Business Valuation and Economic Loss Analysis*, 1-19, 1. See also, generally, JR Spenser, “Adversarial vs Inquisitorial System: is there still such a difference?” (2016) 20 *Terrorism Investigations and Prosecutions in Comparative Law* 601-616. In this article, Spencer argues that the traditional differences between adversarial and inquisitorial justice systems are disappearing, or are at least getting blurred, largely thanks to international legal interactions. This is an important view given the nature regional

jurisdictions rely heavily on the doctrine of *stare decisis* or precedent while the same is not used in civil law systems. When one takes the EAC as an example, Kenya, Uganda and Tanzania follow the common law system, largely due to their colonial history. However, their EAC partners, Rwanda and Burundi are civil law jurisdictions. This difference in legal systems and philosophies can present procedural and substantive challenges in international commercial and investment arbitration. Yet, the harmonisation of laws within the sub-region remains one of the EAC's fundamental objectives. Article 126 of the EAC Treaty emphasises the need for member states to take steps to harmonise their legal training and certification, as well as to encourage the standardisation of judgments of courts within the community.<sup>1055</sup> Partner states of the EAC are to take all necessary steps to, among other things, harmonise all their national laws (including arbitration laws) appertaining to the community.<sup>1056</sup> Similarly, Article 47 of the Protocol on the Establishment of the East Africa Community Common Market enjoins partner states to "...undertake to approximate their national laws and harmonise their policies and systems, for purposes of implementing this protocol."

As Africa gravitates towards sub-regional and continental harmonisation of trade and investment laws, the consolidation of fragmented dispute settlement mechanism is now, more than ever, necessary. Kariuki aptly summarises this need in the following terms:

In light of the expected increase in international trade in the region, and possibility of increased disputes, there is need to harmonise arbitration laws to encourage investments by both foreigners and community members. Fostering commerce in the region will go a long way in the integration process by fostering a regional identity, strengthening the capacity of the region to trade competitively with other parts of the world as well as creating a more stable political economy. However, for all these to be achievable, there is need to assure the business community of a legal regime that is predictable and reliable thus providing the necessary certainty for long term investment. Part of this assurance is the

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integration and international dispute resolution between parties and states from both inquisitorial (civil) and adversarial (common law) legal family backgrounds.

<sup>1055</sup>Article 126 (1) of the EAC Treaty.

<sup>1056</sup>Article 126 (2) (b) of the EAC Treaty.

knowledge that there is a clearly established mechanism of dispute resolution including that of enforcing international awards within the region.<sup>1057</sup>

Geographical, cultural and even religious links are important and inspire most regional integration efforts in Africa. Writing in the context of the Arab Maghreb Union (AMU), El Maghur describes this motivation and its importance in the following words:

The term Maghreb which means ‘the west’ in Arabic, was generally associated with the three states of north western Africa that came under French control during the colonial era. These three states are Algeria, Morocco, and Tunisia, later on Mauritius and Libya joined to form the greater Maghreb region. Geographically, the five countries are located at a cultural crossroad; they border the western wing of the Arab world, then the Southern shore of the Mediterranean, and the north tier of the inter-African diplomatic system. They all share an Islamic heritage with their neighbours to the southwest and east, and this transnational link provides the social base for the greater Maghreb idea.<sup>1058</sup>

Camara contrasts the development of UEMOA and ECOWAS as representing parallel efforts in the integration of West Africa; the former being influenced by francophone colonial philosophy while the latter by Anglophone colonial philosophy:<sup>1059</sup>

Two institutions in Africa that specifically symbolise the two parallel integration efforts among French speaking nations, on the one side, and Anglophone nations of the region, on

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<sup>1057</sup> F Kariuki, “Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community” (2015) 4(1) *Alternative Dispute Resolution* 64-99, at p.69.

<sup>1058</sup> MA El-Maghur “Evolution, Challenges and Prospects of the Arab Maghreb Union 1951-2010” (2009) *University of Nairobi M.A. Thesis* 10.  
<[http://erepository.uonbi.ac.ke/bitstream/handle/11295/3550/Mohamed\\_Evolution,%20challenges%20and%20Prospects%20of%20the%20Arab%20Maghreb%20Union,%201951-2010.pdf?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/3550/Mohamed_Evolution,%20challenges%20and%20Prospects%20of%20the%20Arab%20Maghreb%20Union,%201951-2010.pdf?sequence=1)> 10. Accessed on 1<sup>st</sup> April 2019

<sup>1059</sup> S Camara, “Francophone Regionalism and its Impact on West African Integration” (1986) <<https://digitalcommons.fiu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3194&context=etd>> , 52. Accessed on 1<sup>st</sup> April 2019.

the other, are respectively, L'union Economique at Monétière de L'Afrique et de l'ouest, UEMOA (The West African Economic and Monetary Union), and the Economic Community of West Africa states (ECOWAS). These two institutions represent the most comprehensive integration schemes undertaken in this sub-region.

The geo-political tensions that accrued as a result of post-colonial influence of states by former colonial masters have resulted in unease in the ECOWAS region. France's manipulation of Francophone states in the ECOWAS sub-region, which is dominated by Anglophonic Nigeria, is aptly captured by Camara in the following terms:

France has played a significant role in the process of West African integration; although this role has not always been a positive one. The symbiotic relationship between France and the Francophone states has very often been regarded as an obstacle to a larger West African integration. Following such reasoning, Nigeria considered it necessary to weaken, at least, if not totally break, the existing ties between France and her former colonies in the region. France, on the other hand, encouraged the Francophone states to establish their own economic schemes to counterbalance the 'heavy weight' of Nigeria in West Africa.

Onwuka and Shaw observe that in the period following colonialism and in the nascent days of ECOWAS, there was an active pursuit by France of a "privileged and exclusive" relationship with sub-Sahara Francophone states in West Africa.<sup>1060</sup> This, they add, was geared towards maintaining a zone of influence or "*chasse gardée*" out of the reach of other Western states, and also beyond Nigeria's ambitious regional hegemony.<sup>1061</sup> To cast away these colonial and regional hegemonic influences and tendencies, a truly non-aligned continental economic integration that cuts across the various cultures in Africa is needed.

The OHADA experience offers valuable insights into a possible solution. In an effort to find middle ground and perhaps assuage non-civil law member and prospective member states, the

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<sup>1060</sup> I Onwuka and TM Shaw, *Africa in World Politics: into the 1990s* (St. Martin Press New York 1989) 188.

<sup>1061</sup> *ibid.*

drafters of the revised OHADA Uniform Acts on contracts opted for a model based on the International Institute for the Unification of Private law (UNIDROIT) Principles of International Commercial Contracts.<sup>1062</sup> The UNIDROIT principles are neither common nor civil law but a genuine synthesis of the contract law principles of the major legal systems of the world.<sup>1063</sup> Fagbayibo believes that this development enhances the prospects of common law jurisdictions joining the OHADA.<sup>1064</sup>

## **5.6. The Role of the African Single Court in Africa's Economic Regionalism**

The proposed ACJ&HR's trade and investment chamber can play a pivotal role in the continent's economic integration. This part discusses at least three of its possible contributions.

### ***i) Harmonisation and Development of an African Community Law***

Trade and investment agreements and protocols, both at the continental and sub- regional levels, in Africa directly addresses the need for harmonisation of trade and investment policies as a core objectives of their existence.<sup>1065</sup> They aim to promote uniformity in trade practices and policies at the continental, sub-regional and even national levels.<sup>1066</sup> Therefore, as trade and investment policies converge, at the continental level, it is imperative that dispute settlement systems are also consolidated and aligned with the continental blue print. With increase in cross border trade and investment, there is obviously bound to be a concurrent increase in disputes and the need to resolve them.

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<sup>1062</sup>M Fontaine, "The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts" (2004) 3 *Uniform Law Review* 573.

<sup>1063</sup>S Date-Bah, "The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa: Reflections on the OHADA project from the Perspectives of a Common Law Lawyer from West Africa" (2004) 2 *Uniform Law Review* 271.

<sup>1064</sup>B Fagbayibo, (n)591, 318.

<sup>1065</sup>Article 3 the AfCFTA Agreement; Article 3 and 4(2) (e) of the AEC Treaty; Articles 4 and 5 of the TFTA Agreement; Articles 2 and 3 of the ECOWAS Treaty Article 5 of the EAC Treaty Article 5 of the SADC Treaty Article 7 of the COMESA Treaty.

<sup>1066</sup> Kane, (n) 980, 1.

The AEC Treaty contemplates the merger of RECs and provides a six-stage implementation of the harmonisation process.<sup>1067</sup> Despite this, the treaty is not clear or detailed on how continental and sub-regional dispute settlement systems are to be harmonised. However, RECs have been identified as critical building blocks for the ultimate realisation of the AEC.<sup>1068</sup> This presents an opportunity for the ACJ&HR to play a pivotal role in the process of continental harmonisation of trade and investment dispute resolution.

The ACJ&HR is an effort in the harmonisation of the fragmented continental dispute settlement systems set up under the auspices of the AU.<sup>1069</sup> The African single Court emerged following a merger of the erstwhile ACJ and the ACH&PR. One of its core objectives was to centralise continental dispute resolution so as to inculcate efficiency and efficacy in the system.<sup>1070</sup>

One of the most scathing criticisms of the African dispute resolution system is that the continent has failed to develop an identifiable body of law that can be referred to as a continental community law.<sup>1071</sup> This criticism is of course laced with an element of bias based on a comparison of Africa's integration with the EU. The EU has over the years developed community law that is now embodied in statutes and decisions of EU courts (both the CJEU and ECJ).<sup>1072</sup> Through its courts, the EU has been able to develop principles that have influenced legislation at both the EU

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<sup>1067</sup> Article 6 of the AEC Treaty.

<sup>1068</sup> Articles 4 (2) and 6 (2) (b) Of the AEC Treaty.

<sup>1069</sup> Ogwezzzy and Michael, "Challenges and Prospects of the African Court of Justice and Human Rights" (2014) 6 *Jima U.J. L* 1.

<sup>1070</sup> GJ Naldi and DM Konstatinos, "The African Court of Justice and Human Rights: A Judicial Curate's Egg" (2002) 9 *International Organisations Law Review* 383-449 at 384.

<sup>1071</sup> RO Frimpong, (n) 44, 62-63 argues that African Regional Courts remain largely under-studied from an academic perspective. He attributes this to the courts' low contribution to the jurisprudence of international law in general, international human rights law and regional integration law. He also observes that the regional courts face concerns over their legitimacy or their right to adjudicate over disputes. See also, G Erasmus, (n) 450. See also, generally, M Olivier, "The Role of Africa Union Law in Integrating Africa" (2015) 22(4) *South African Journal of International Affairs* 513-533.

<sup>1072</sup> D Chalmers et. al, *The European Union Law* (Cambridge University Press 2011) 143, 147-148.



and national levels.<sup>1073</sup> The CJEU has also utilised its appellate jurisdiction on matters affecting or touching on community law, preliminary ruling procedure and the direct effect of its decisions, in achieving harmony and consistency in the application European law.<sup>1074</sup>

Notwithstanding the criticism levelled against African regional courts, it is fair to state that each REC in Africa has attempted to develop jurisprudence in the various sets of circumstances in which they obtain.<sup>1075</sup> This has, however, largely been in the area of human rights with little in the area of trade and investments.<sup>1076</sup>

It cannot be gainsaid that a common trade and investment approach will require a predictable, consistent and uniform substantive, procedural and normative legal system for resolution of disputes. The ACJ&HR's trade and investment chamber would not only further this aim of achieving certainty in African continental trade and investment normative principles, but will also set pace for the development of a unique African continental community law. As an overarching tribunal with appellate jurisdiction on matters relating to the interpretation and application of African trade and investment treaties and protocols, an ACJ&HR trade and

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<sup>1073</sup>ibid, 158.

<sup>1074</sup>AW Green, *Political Integration by Jurisprudence: The Role of the Court of Justice of European Community in European Political Integration* (Amsterdam Nijhoff – Leyden 1996) 9-26, at 21. A detailed discussion of the three institutes of Appellate jurisdiction, direct effect and preliminary ruling procedure and how they are employed by the CJEU in ensuring uniform application and integration of EU Community Law is discussed in chapter 3.2.2 of this thesis.

<sup>1075</sup> RO Frimpong, (n) 44, at 74. See a detailed discussion of some of the landmark cases decided by African RECs in chapter 3.4 of this thesis.

<sup>1076</sup> LN Murungi and J Gallinetti, "The Role of Sub-Regional Courts in the African Human Rights System" (2010) 13 *International journal of Human Rights* Issue 1-8. They advance that African RECs have introduced a new layer of supranational protection of human rights in Africa. Frimpong, (n) 44, 65, 70, 79 and 80, considers the transformation of REC Courts into human rights Courts as unnecessary and an antithesis of their original objective of resolving trade and investment disputes. Besides, Frimpong, (n) 44, 74, observes that this expansion of mandate breeds unnecessary tension between member states and reduces the legitimacy and acceptability of the courts. Naldi and Konstantinos, (n) 1070, 1, also observe that the merger and expansion of the ACJ&HR's jurisdiction is a bold demonstration of the desire of the membership of the AU to create a modern institution that addresses the issues of modern day Africa and the world.

investment chamber will effectively lead the way in crafting binding jurisprudence in this area. This will ensure certainty and predictability of African Community law. The direct effect of the decisions of the Court and a requirement that sub-regional and national courts should refer to the Chamber, for preliminary rulings, matters touching on continental trade and investment law, will also ensure consistency in the application of the normative principles of African continental community law.

Africa's trade and investment integration is unique and, therefore, the criticism levelled against it based on the EU model is sometimes misplaced. For instance, EU community law developed in a less fragmented environment, while a harmonised African continental integration system has to contend with well-established sub-regional RECs, whose existence preceded the continental economic system.<sup>1077</sup> Africa's efforts at continental integration have also had to reckon with an entrenched web of overlapping sub-regional systems. It is in light of this unique quality that the African continental economic integration should be crafted differently from the precedence set by the EU. Although the overall objectives of economic integration may be similar in Africa and Europe, the circumstances in which both are obtained require different approaches.

In terms of dispute resolution, therefore, the use of sub-regional courts as first instance courts of the ACJ&HR, will be useful. This approach will not only make good use of already existing physical and human resources, but will also build on existing structures, jurisprudence, norms and dispute resolution cultures that have been shaped for decades. After all, one of the AECs objectives is to use the sub-regional RECs as building blocks for continental economic integration.<sup>1078</sup>

Despite its uniqueness, the continental integration of trade and investment dispute resolution systems in Africa can learn from the CJEU with regards to admission of cases brought

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<sup>1077</sup>Unlike Europe, structured harmonised continental economic integration in Africa is coming much later after sub-regional economic integration. In fact, the former hopes to build on the latter.

<sup>1078</sup>Articles 6 and 28 of the AEC Treaty.

by individuals.<sup>1079</sup> Although treaties of the sub-regional courts of the ECOWAS, EAC and COMESA expressly provide for direct access by individuals to the REC courts, direct access by individuals at the continental level, particularly of trade and investment dispute settlement mechanisms, is almost non-existent.<sup>1080</sup> For example, the AfCFTA dispute settlement mechanisms, including arbitration, are strictly reserved for state parties to the protocol and leaves no room for access by individuals.<sup>1081</sup>

The admission of cases filed by individuals is crucial in the effort to develop African community law. There are at least two illustrations for this conclusion.

Firstly, the European integration model has evolved enduring normative principles through the sheer volume of cases filed by individuals.<sup>1082</sup> On the African continent, Frimpong observes that the limited but progressive jurisprudence that has come out of African regional courts has

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<sup>1079</sup> Article 272 of the Treaty of the CJEU expressly grants jurisdiction to the Court to admit and determine cases filed by individuals against EU institutions, member states and to award damages therefor. The Court also has an arbitration mandate under Articles 263(4), 268 and 340(2).

<sup>1080</sup> Article 4 of the ECOWAS Supplementary Protocol A/SP.1/01/05; Article 30 of the EAC Treaty and Article 26 of the COMESA Treaty. The 1992 SADC Treaty, Article 15(1) (2) provided for rights of individuals to bring action in the Court. At the 3<sup>rd</sup> Summit of the Heads of state and Government in August 2010, SADC decided to “Review the role, functions and terms of references of the SADC Tribunal” in obvious response to the decisions in the Mike Campbell cases. See, RO Frimpong, “Enforcing Judgement of the SADC Tribunals in the Domestic Courts of Member States” (2011) *Monitoring Regional Integration in Southern Africa Yearbook 2010* 115-141, at 115 and 116. See also chapter 4 of this thesis for a detailed discussion on the right of individuals to access continental economic disputes settlement mechanisms established under the aegis of the AU

<sup>1081</sup> Article 20 (1) of the AfCFTA Agreement is express that the “A dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between state parties” (emphasis added). Article 28 of the AfCFTA Protocol on the Rules and Procedures for the Settlement Disputes is similarly worded.

<sup>1082</sup> For example, the CJEU received 1683 cases in the year 2018; of which 834 were filed by individuals and 568 regarded requests for preliminary rulings. See the *Report of the Court of Justice (2018)* Luxembourg, Office of Official Publications of the European Communities.

<[https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ ra\\_2018\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ ra_2018_en.pdf)> accessed on 13<sup>th</sup> May 2019.

largely been as a result of cases which have been brought by individuals.<sup>1083</sup> He further notes that the regional courts which exclude admission of cases by individuals have remained moribund since African states do not traditionally sue each other, nor do they have a culture of pursuing their trade remedies through international disputes resolution fora.<sup>1084</sup>

The proposed African single court's trade and investment chamber can redress this problem by guaranteeing investors, both African and foreign, of a reliable and independent forum for dispute resolution, outside national courts which are largely perceived to lack impartiality and independence from the state member apparatus.<sup>1085</sup>

## **ii) *Developing African Capacity and Experience in International Arbitration***

As established in the preceding parts of this chapter, arbitration is the most preferred mode of setting investment disputes.<sup>1086</sup> This is done either through sub-regional RECs or international centres established through private sector initiatives. In Africa both approaches are used. There are independent private sector centres and arbitration as part of regional courts' mandate.

As observed in the earlier part of this chapter, disputes involving African states account for at least 25% of state-investor disputes registered at the ICSID.<sup>1087</sup> However, the participation of African arbitrators has remained very low, at around 2%.<sup>1088</sup> One of the reasons advanced for this sad state of affairs is that African arbitrators lack the experience, exposure and competence to

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<sup>1083</sup> RO Frimpong, (n) 44, 78-79. See also, O Bore, "The dispute Settlement Mechanism under the African Continental Free Trade Area" (2018) <<https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html>> accessed on 11<sup>th</sup> May 2019. For a detailed discussion of the AfCFTA dispute settlement system, see chapter 3 of this thesis.

<sup>1084</sup> RO Frimpong, (n) 44, 62-63. See also, G Erasmus, "The Final Trade Remedy Arrangement of the Tripartite Free Trade Area" (2017) <<https://www.tralac.org/discussions/article/11988-the-final-trade-remedy-arrangement-of-the-tripartite-free-trade-area.html>> accessed on 10<sup>th</sup> May 2019.

<sup>1085</sup> A Cofelice, (n) 48, 34. See also, RO Frimpong, (n) 44, 65-66.

<sup>1086</sup> See Chapter 5.3.2 above for a detailed discussion of international arbitration in Africa

<sup>1087</sup> ICSID 2019 Statistics, n 956.

<sup>1088</sup> *ibid.*

resolve complex investor-state disputes.<sup>1089</sup> Oddly, even African state parties to disputes prefer appointing European arbitrators and counsel in disputes in which they are involved.<sup>1090</sup>

The principal role of AfCFTA is to grow Intra African trade.<sup>1091</sup> Currently intra-Africa trade stands at between 17-20% of the total volume of trade in Africa.<sup>1092</sup> This may look insignificant and suggest that African states are mostly net importers of goods and services, mainly from Europe and Asia. However, it is projected that the AfCFTA is bound to significantly change this. Intra-Africa trade is projected to rise by up to 52% under the AfCFTA.<sup>1093</sup>

The growth of intra-African trade presents an invaluable opportunity for the Africa single court's proposed trade and investment chamber to increase the participation of African Arbitrators in resolving intra-African disputes. Indeed, as Torgbor observes, time is ripe for Africans to sit as Arbitrators in disputes involving Africa and African States.<sup>1094</sup> In other words African Arbitrators should be employed in resolving intra-African disputes that may arise out of the AfCFTA and AEC.

This will sharpen the skills and competencies of African Arbitrators and arm them with the experience necessary to launch them into international arbitration circles. The African Arbitration Association (AAA) and other continental arbitration centres should align their objectives with those of the AfCFTA and the proposed ACJ&HR trade and investment chamber so as to offer a pool of dispute resolution experts for purposes of resolving African trade and investment disputes. This model can be cascaded to sub-regional courts. Furthermore, both the continental and sub-regional investment approaches should be anchored on the Pan-African Investment Code with sub-regional codes aligning to the continental investment blueprint while including features unique to

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<sup>1089</sup> Torgbor, (n) 936, 114.

<sup>1090</sup> Namachanja, (n) 951, 152.

<sup>1091</sup> Article 3 of the AfCFTA Agreement.

<sup>1092</sup> This compares to 59% and 69% for intra-Asian and Intra-European trade, respectively, <[https://www.uneca.org/sites/default/files/PublicationFiles/qa\\_cfta\\_en\\_230418.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/qa_cfta_en_230418.pdf)> accessed on 10<sup>th</sup> May 2019

<sup>1093</sup> *ibid*.

<sup>1094</sup> Torgbor, (n) 936, 114.

the sub-regions. This, should, however, take cognisance of the potential, and perhaps, the disruptive impacts of the upcoming AfCFTA Protocol on Investment.

### **iii) *Enforcement of Decisions***

A continental trade and investment dispute settlement system should not only assure its users of the finality of its decisions, but also of the timeous enforcement of such decisions without interference by national courts. As observed in the earlier parts of this thesis, international dispute resolution is gravitating towards the use of formal courts over ad hoc or private systems of dispute resolution.<sup>1095</sup> One of the reasons for this shift is the guarantee of enforcement under treaty dispute settlement bodies against non-formal and ad hoc methods.<sup>1096</sup> Regional courts provide for enforcement mechanisms which member states subscribe to through conclusion of treaties and protocols.<sup>1097</sup> Some even go further to exclude the involvement of national courts in an effort to secure direct effect of judgments or decision of regional courts.<sup>1098</sup>

Commercial and investment arbitration are largely private processes that are based on party agreement. The outcomes of the processes are usually subject to enforcement processes provided in domestic courts. This makes private non-formal dispute mechanisms less attractive than regional courts and tribunals, whose decisions, enforcement and observance, are underwritten by states who sign protocols or conventions excluding national courts' intervention.

The creation of the AU single court's trade and investment chamber can also be justified on the premise that it would ensure enforcement of its decisions through the enforcement

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<sup>1095</sup> See chapter 2.5.1 (d) of this thesis.

<sup>1096</sup> According to Frimpong, enforcement or acceptability of a court and its decisions is crucial to the international Court's legitimacy or authority to adjudicate over disputes, RO Frimpong, (n) 44, 64.

<sup>1097</sup> For example, members of the AfCFTA are bound by the Agreement and the Enforcement mechanisms set out in Articles 25 and 27 of the protocol on Rules and Procedures on the Settlement of Disputes.

<sup>1098</sup> For example, the OHADA CCJA's decision on an appeal from a national court, is final and binding upon members, and has a direct effect under Article 9 of the OHADA Treaty. The ECOWAS Court of Justice has an enforcement organ in each member state to ensure compliance with its decisions. See chapter 3 of this thesis for a discussion on the structure an enforcement processes under RECs in Africa.

mechanism set out under the Constitutive Act of AU.<sup>1099</sup> These mechanisms are not available in private or non-formal dispute settlement methods. It, therefore, helps that the mechanisms under the AfCFTA and AEC have the backing of the AU and its enforcement mechanisms. The AU single court will, therefore, offer investors the assurance that decisions of its trade and investment chamber, including arbitration panels will be enforced.

The merger of the ACJ and ACH&PR was partly motivated by the need to establish a cost-effective dispute settlement system.<sup>1100</sup> In essence, that the financing of a single court by the AU would be far much cheaper than the current situation where several dispute settlement bodies exist at the continental and sub-regional levels. To host dispute settlement efforts under one roof would no doubt further this objective.

However, the mechanisms provided by both the AEC and AfCFTA, seem to restrict their application to state parties, leaving no room for disputes between individuals or between states and individuals.<sup>1101</sup> ISDS and private party arbitration is not provided for. It may, however feature in

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<sup>1099</sup> For example, Article 23 of the Constitutive Act of the AU provides that the Assembly of Heads of State and Government shall determine the appropriate sanctions to mete out against an errant member, and which may include: denial of, right to speak at meetings, voting rights, present candidates, transport and communication links with other members, and other measures of political and economic nature.

<sup>1100</sup> DU Plessis, “A Court not found” (2007)7(2) *African Human Rights Law Journal* 522-544, 523. See also K Kindiki, “The Proposed Integration of the African Court of Justice and African Court of Human Rights: Legal Difficulties and Merits” (2007) 15 *RADIC* 138; also, F Viljoen and E Baimu, “Courts for Africa: Considering the co-existence of the African Court on Human and People’s Rights and the African Court of Justice” (2004) 22 *NQHR* 241.

<sup>1100</sup> Besides its criminal law jurisdiction under Article 28A, Article 29 of the ACJ&HR Protocol limits the Jurisdiction of the Court and the Dispute Resolution Mechanism set out therein to state parties. See the discussion in chapter 4.2.3 of this thesis on the Jurisdiction of the Court.

<sup>1101</sup> Article 28 of the AfCFTA protocol on Rules and procedures for settlement of disputes is expressly clear that the mechanisms provided therein are only available for inter-state party disputes. See the discussion in chapter 4.2.3 on the access by individuals to the dispute settlement mechanisms under both the ACJ&HR Protocol and the AfCFTA Protocol on Rules and Procedures for Settlement of Disputes. D Luke, (n) 2, [30], describes the AfCFTA dispute settlement mechanism as an inter-governmental trade governance system deliberately modelled along the WTO dispute administration approach.

the final Protocol. As observed in the preceding parts of this thesis, the AfCFTA dispute settlement system is modelled upon the WTO dispute settlement model. The WTO model and the AfCFTA are state-centred. The African single court will have to expand its scope to include private parties if it is to address intra-African trade disputes involving traders who traverse African markets across national borders. This will also harmonise its approach with courts of RECs in Africa such as COMESA, ECOWAS and EAC, which already recognise and admit claims by individuals.

The enforcement of the decisions of RECs and AU institutions has not always been easy and has often been met with resistance, particularly from member states of the integration organisations.<sup>1102</sup> One can, therefore, argue, with some force of merit, that there is no guarantee that there will be a change in the attitude of African States towards the enforcement of decisions of the proposed trade and investment chamber of the ACJ&HR.

However, there are at least two reasons to be optimistic that the trade and investment chamber of the ACJ&HR may fare differently and perhaps attract different results. Firstly, trade and investment disputes are remarkably different from decisions made by international or regional courts in the areas of, say, human rights, governance, territorial boundary delimitation disputes, or political questions, such as the validity of presidential elections. An analysis of the decisions of REC courts whose observance or enforcement has largely been resisted by African states aptly demonstrates this point.<sup>1103</sup> The main reason underlying the resistance of these kind of decisions by some African states is that states often feel that such decisions tend to undermine their unfettered exercise of political and sovereign authority. In most of these cases, it is states who are

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<sup>1102</sup> For a detailed discussion on the difficulties and resistance by African states of determinations made by REC courts in the SADC, EAC and ECOWAS; see chapter 3.4 of this thesis.

<sup>1103</sup> For example, the *Mike Campbell* cases at the SADC tribunal involved the state sanctioned seizure of land by the Zimbabwean government pursuant to the state's policy of land redistribution. The EACJ in the *Anyang' Nyong'o* Case dealt with the propriety of the appointment of members representing Kenya in the EALA. The same court's decision in the case of *East African Civil Society Organisation Forum V the Attorney General of Burundi*, addressed matters relating to the legal propriety of the Presidential elections in Burundi. All these decisions are discussed in depth in Chapter 3.4 of this thesis. The common thread running through all these decisions is that the losing state parties declined to give effect to the decisions of the courts and even resisted enforcement proceedings. For a discussion on the refusal to enforce decisions of regional courts in Africa, see generally, Alter, Gathii, and Helfer, (n) 59, 293-328.



accused and held liable for the perpetration of the violations of human rights, democracy and treaty rights. Regional courts' decisions are, therefore, often, seen as an affront or attack on the disaffected member state's government of the day.

However, trade and investment dispute resolution present a different proposition all together. Decisions of international courts with regard to trade and investments disputes settle purely commercial disputes without imputing political or governance culpability or deficiencies upon states. Parties' interests in trade and investment disputes are largely monetary and not necessarily political. The motivation to frustrate commercial decisions of courts is, therefore, much lower than decisions in political and human rights cases. This proposition has empirical backing. A study conducted by the Queen Mary University of London in 2008 concluded that in both institutional and ad hoc arbitrations, a compliance rate of 75% was recorded, with an 88% satisfaction by its users.<sup>1104</sup>

Secondly, the deliberate choice of the WTO model of dispute resolution by the drafters of the AfCFTA Protocol on the Rules and Procedures on Settlement of Disputes offers a useful opportunity for understanding how to navigate enforcement challenges that its AfCFTA DSB and Appeal Body may face. The WTO dispute settlement mechanism is only available for disputes between state parties.<sup>1105</sup> It is an exclusively state-state dispute settlement mechanism. Empirical evidence shows that a majority of WTO DSU panels' decisions are complied with without resort to enforcement proceedings.<sup>1106</sup> The WTO DSU provides that if a member fails to comply with a

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<sup>1104</sup> Queen Mary University of London, School of International Arbitration, (2008) *International Arbitration Study* <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAsstudy\\_2008.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAsstudy_2008.pdf)> accessed on 8<sup>th</sup> June 2019, 2.

<sup>1105</sup> Article XXII and XXIII of the now superseded GATT 1947; and Annex 2 of the WTO Agreement (Understanding on Rules and Procedures Governing the Settlement of Disputes).

<sup>1106</sup> The enforcement mechanisms available for WTO decisions are set out in Articles 21, 22 and 26 of Annex 2 of the WTO Agreement. These include: a surveillance of implementation of recommendations and rulings; compensation and suspension of concessions by other member states; and any other measures proposed by the aggrieved member provided that it does not offend the WTO agreements and/or Annexes. Cameron and Gray remark that the WTO System is highly successful, judging by the frequency of its use. In the first eight years of its use, 200 cases were registered. By 2018, 573 new cases had been registered. See J Cameron and K Gray, "Principles of International Law

final ruling in a dispute, the successful party may retaliate by suspending trade concessions that owe by the offending member.<sup>1107</sup> However, this option is hardly resorted to since compliance is the norm rather than the exception.<sup>1108</sup> Although the WTO has been criticised for offering a weak and unpredictable mechanism, particularly in asymmetrical disputes between large and small economies, this problem is not of immediate concern for African economic integration, since most African states are in the same general economic league of developing nations.<sup>1109</sup>

Thirdly, even the current ICSID ISDS system, despite the scathing criticism levelled against it, enjoys a fairly high non-coercive compliance rate.<sup>1110</sup> The ICSID Convention offers at least four advantages in terms of compliance and enforcement of awards issued by its tribunals. One, a state party to the ICSID award has an obligation to comply with the award.<sup>1111</sup> Two, all state

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in the WTO Dispute Settlement Body” (2001) *International and Comparative Law Quarterly* 248, 250. See also, [https://www.wto.org/english/tratop\\_e/dispu\\_e/disputstats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disputstats_e.htm) accessed on 23<sup>rd</sup> September 2019.

<sup>1107</sup> *WTO 2018 Report* <[https://www.wto.org/english/res\\_e/booksp\\_e/14\\_anrep18\\_disputesettlement\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/14_anrep18_disputesettlement_e.pdf)> accessed on 6<sup>th</sup> June 2019.

<sup>1108</sup> In the *WTO 2018 Report*, its Director General is quoted as describing the WTO dispute settlement system as “unquestionably one of the –if not the-most active international adjudicatory systems in the world. And it still operates faster than any other.” (2019)

[https://www.wto.org/english/res\\_e/booksp\\_e/14\\_anrep18\\_disputesettlement\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/14_anrep18_disputesettlement_e.pdf) accessed on 6<sup>th</sup> June 2019, 129. See also, Cameron and Gray, (n) 1106, 250.

<sup>1109</sup> ML Movsesian, “Enforcement of WTO Rulings: An Interest Group Analysis” (2003) 32(1) *Hofstra Law Review* 3. See also, JH Jackson, “Emerging Problems of the WTO Constitution: Dispute Settlement and Decision making in the Jurisprudence of the WTO” (1999) in P Ruttley and others (ed), *Liberalisation and Protection in the World Trading System* 25, 31. Jackson argues that “lack of in-house legal expertise in small countries make them to be at a substantial disadvantage against large economies like the United States or the European Community.”

<sup>1110</sup> For example, of the 706 decisions rendered by ICSID tribunals since its establishment in 1972, only 17 annulment applications have been allowed, representing a paltry 2.4 %. Only 121 applications for annulment have been registered. It is worthy of note that ICSID administers 70 % of all known investor-state disputes. See, <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed on 7<sup>th</sup> June 2019.

<sup>1111</sup> Article 53 of the ICSID Convention. See also, generally, ST Tonova, “Compliance and Enforcement of Awards: Is there a Practical Difference between ICSID and non- ICSID Awards?” (2012) 5 in *Investment Treaty Arbitration and International Law* <<https://arbitrationlaw.com/library/compliance-and-enforcement-awards-there-practical-difference-between-icsid-and-ad-hoc>> accessed on 30<sup>th</sup> September 2019.

parties to the Convention have a treaty obligation to recognise an ICSID award as binding and to enforce the pecuniary obligations arising out of the award as a final judgment of the state's court.<sup>1112</sup> Three, the ICSID Convention establishes a delocalised self-contained mechanism for review of its awards thereby eliminating any review by national courts.<sup>1113</sup> Four, in the event that there is need for recovery of monetary awards, the members of the ICSID Convention agree to the attachment and sale of their commercial assets (assets not covered by the doctrine of sovereign immunity) situated in any other ICSID member state.<sup>1114</sup>

The African continental economic regionalism adopts international arbitration and the WTO DSU model in its dispute settlement architecture. An adoption of these mechanisms, with largely successful compliance and enforcement records, will also be useful in giving effect to the continent's aspirations with regards to continental trade and investment dispute resolution.

Even as Africa draws valuable lessons from the ICSID and WTO DSU, it must still be noted that those systems are still imperfect. A perfect system can never be achieved but the existing ones can always be improved. For example, it has been suggested that enforcement of decisions rendered by regional and international adjudicatory organs should be strengthened by developing a system that authorises collective retaliation against offending members, or one that grants direct

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<sup>1112</sup> Article 54 of the ICSID Convention.

<sup>1113</sup> Articles 50, 51 and 52 of the ICSID Convention provides for the procedure for Revision and Annulment of an ICSID award, through an Ad hoc Committee. The Ad hoc Committee in *MINE v Guinea*, decision on annulment of 22<sup>nd</sup> December 1989, 4 *ICSID Reports* pp 84 at 84 and 88 interpreted Article 53 of the ICSID Convention to the effect that the award shall be binding upon all parties "and shall not be subject to any other remedy except to those provided by this convention" and "that the convention excludes any attack on the award in national courts".

<sup>1114</sup> Under Article 55 of the ICSID Convention, a state Party's immunity from execution remains unfettered by the ICSID Convention's provisions on enforcement. This means that that only the state's property serving commercial purposes in any ICSID member state is subject to execution in enforcement of an ICSID award. For a discussion on the differences between sovereign and commercial property of a state see the decisions in *SOABI v Senegal*, Award of 25<sup>th</sup> February 1988, 2 *ICSID Reports*, 190; *Benvenuti & Bonfant v Congo*, Award of 21<sup>st</sup> July 1987 1 *ICSID Reports*, 373.

effect to the decisions of international tribunals domestically.<sup>1115</sup> These proposals may also be adopted for the proposed ACJ&HR Trade and Investment Chamber.

## **5.7. Towards a Multilateral Trade and Investment Court System**

### ***5.7.1 The Rationale***

In adopting a formal multilateral investment court mechanism, the African continent will not necessarily be breaking new ground. As already discussed in the preceding chapters, trade and investment dispute resolution is gravitating towards the use of formal international courts.<sup>1116</sup> This is in reaction to the challenges that *ad hoc* and institutional investment and commercial arbitration face. These problems include:<sup>1117</sup>

- (i) the exorbitant costs associated with the system,
- (ii) its lack of efficiency; lack of impartiality of the arbitrators, which is largely attributable to the manner in which the arbitrators are appointed;
- (iii) the lack of diversity in the appointment of arbitrators, with dominance by European lawyers; and
- (iv) inconsistencies in the decisions of tribunals, making the process unpredictable and, therefore, unreliable; and laborious enforcement mechanisms.

The EU, against which African economic integration is often benchmarked, has proposed the establishment of a permanent multilateral investment court complete with an appellate mechanism.<sup>1118</sup> According to the EU, the establishment of the court is the only reform that can

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<sup>1115</sup>J Pauwelyn, "Enforcement and Countermeasures in the WTO: Rules are Rules- - Towards a More Collective Approach" (2000) 94 *American Journal of International Law* 335, 343-345. See also, Tonova, (n) 1111, 4.

<sup>1116</sup> See the discussion in Chapter 2.5.1.4 of this thesis. In the Chapter, the research identifies enforcement through direct effect of decisions and transparency as the key reasons for the preference of formal systems of dispute resolution. The contexts of the EU, MERCOSUR, OHADA and other bodies are used.

<sup>1117</sup> For a detailed discussion of these and other challenges and problems of international commercial and investment arbitration, see Chapter 2.5.2 (b) (ii) of this thesis.

<sup>1118</sup> The EU has presented two papers to the UN Working Group under the UNCITRAL tasked with examining the reform of Investor-State Dispute Settlement (ISDS). The first EU paper sets out the EU's proposal of establishing a

effectively respond to all the concerns identified in the process. EU Commissioner for Trade, Cecilia Malmstrom, instructively underscored the EU's position in the following terms:

States all over the world have identified problems with the current system. The EU believes that the systemic reforms however can address these concerns, with the creation of a permanent body to resolve disputes – a multilateral investment court.<sup>1119</sup>

The idea is to have a two-tier court system with a permanent tribunal of first instance and an appellate tribunal.<sup>1120</sup> The EU proposals are contained in two papers. The EU's first paper provides that the establishment of the investment would:<sup>1121</sup>

- (i) enhance the predictability and consistency of decisions and ensure their correctness,
- (ii) eliminate the ethical concerns of the current system, and
- (iii) effectively address the problems of excessive costs and duration.

The EU second paper makes proposals for an effective work plan and text proposals to be considered by all countries and stakeholders.<sup>1122</sup> The CJEU recently endorsed the EU Commission's proposal by issuing an opinion confirming the compatibility of the proposed investment court with EU treaties.<sup>1123</sup> Support for the investment court has intensified, particularly following the CJEU's decision that the investor-state arbitration agreements, in intra-EU bilateral

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permanent multilateral investment court with an appellate mechanism and full time adjudicators. The EU position papers <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972>> accessed on 8<sup>th</sup> June 2019.

<sup>1119</sup> <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1943>> accessed on 7<sup>th</sup> June 2019.

<sup>1120</sup> EU Paper 1 to the UNCITRAL Working Group III, 18<sup>th</sup> January 2019, Parts 3.2 and 3.3, [13,14 and 15] <[https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf)> accessed on 7<sup>th</sup> June 2019.

<sup>1121</sup> <[https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157632.pdf](https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf)> accessed on 7<sup>th</sup> June 2019.

<sup>1122</sup> *ibid.*

<sup>1123</sup> CJEU Opinion 1/17 Opinion of the Advocate General delivered on 29<sup>th</sup> January 2019 given pursuant to a Request by the Kingdom of Belgium under Article 218(11) of the Treaty of the Functioning of the European Union (TFEU) or the Treaty of Rome.

<<http://curia.europa.eu/juris/document/document.jsf?docid=210244&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=13279134>> accessed on 8<sup>th</sup> June 2019.

investment agreements are incompatible with the principle of autonomy of EU law and are, therefore, void.<sup>1124</sup>

The EU has already included the proposed investment court in its recent trade and investment agreements with Canada, Mexico, Singapore, Vietnam and the Netherlands, with the Model Investment Agreement 2018 acting as a clear demonstration of its determination to implement a shift from ad hoc and institutional arbitration, to the formal multilateral investment court system.<sup>1125</sup>

UNCTAD is also moving towards the same direction as the EU, in terms of trade and investment dispute resolution. UNCTAD has identified as an inherent weakness of the existing ISDS system, including ICSID, the fact that, under most BITs and MITs, only investors have an

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<sup>1124</sup> In its judgement in *Slovak Republic v Achmea B.V* (Case C-284/16), the CJEU ruled that the arbitration clause contained in Article 8 of the 1991 *Netherlands-Slovakia BIT* has an adverse effect on the autonomy of EU law and is therefore incompatible with EU law. This decision is regarded as a landmark with ripple effects on the 196 intra-European BITs concluded in Europe. The decision is available at <<http://curia.europa.eu/juris/documents.jsf?num=C-284/16>> For the effect of the decision see, generally, C Fouchard and M Krestin, “The Judgement of the CJEU” (2018) in *Slovak Republic v Achmea- A Loud Clap of the Thunder on Intra-EU BIT Sky!* <<http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/>>; D Dragiev, “2018 in Review: The Achmea Decision and its Reverberations in the World of Arbitration” (2019) <<http://arbitrationblog.kluwerarbitration.com/2019/01/16/2018-in-review-the-achmea-decision-and-its-reverberations-in-the-world-of-arbitration/>> accessed on 8<sup>th</sup> June 2019.

<sup>1125</sup> Article 3.12 of the EU-Singapore Investment Protection Agreement (IPA), available at <[http://www.europarl.europa.eu/doceo/document/TA-8-2019-0090\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0090_EN.html?redirect)>; Article 5 (1) of the Netherlands Model Investment Agreement 2018, available at <<https://www.bilaterals.org/?netherlands-model-investment>>; Article 5 (1) of the EU-Viet Nam Partnership and Cooperation Framework Agreement <[http://eeas.europa.eu/archives/delegations/vietnam/documents/eu\\_vietnam/pca.pdf](http://eeas.europa.eu/archives/delegations/vietnam/documents/eu_vietnam/pca.pdf)>; Section X of the EU-Mexico Trade Agreement, available at <<https://ec.europa.eu/trade/policy/in-focus/eu-mexico-trade-agreement/>>; and Chapter 29 of the Canada-European Union Trade Agreement (CETA), available at <<https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>>. Note that the CJEU opinion referred to in note 266 above was sought with respect to the effect of the decision in *Slovak Republic v Achmea* on the CETA. See also, generally, T Birengel, “European Union: A Shift from Arbitration to Multilateral Investment Court System at EU” (2019) <<http://www.mondaq.com/turkey/x/791418/Arbitration+Dispute+Resolution/A+Shift+From+Arbitration+To+Multilateral+Investment+Court+System+At+EU>> accessed on 8<sup>th</sup> June 2019.

express right to bring claims against states and not vice versa.<sup>1126</sup> In other words, this primary state-investor dispute mechanism that has existed for over six decades as a one-way street. This is despite the fact that actions of foreign investors, such as the degradation of the environment, or delays in completing public utility projects, may result in the host state incurring substantial restoration costs and pecuniary losses.<sup>1127</sup>

The investment court system, will avail opportunity to the host state to mount claims against foreign investors, just as foreign investors do against host states.<sup>1128</sup> African states are already leading the way in this respect. Both the Morocco-Nigeria BIT and the SADC FIP accord state that parties have a clear and unequivocal right to bring and maintain treaty claims against foreign investors.<sup>1129</sup> The right of participation, either as substantive parties, amicus or interested

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<sup>1126</sup>UNCTAD World Investment Report 2017 at p.10. Available at [https://unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf) accessed on 7<sup>th</sup> June 2019. The right of a state to bring an action against an investor is what Laborde calls “the reverse paradigm of Investment Arbitration Disputes”. See, G Laborde, “The Case for Host State Claims in Investment Arbitration” (2010) 1(1) *Journal of International Dispute Settlement* 97-122, 97-102. Such cases have been few and far in between because of the uncertainty as to whether this right exists in the first place. These cases constitute less than 1% of the ICSID cases with conflicting and inconsistent jurisdictional interpretations.

<sup>1127</sup>G Laborde, *ibid*, 100, observes that “A review of the entire case docket of the ICSID quickly evinces, nonetheless, that the idea of equal access entertained by the drafters of the ICSID Convention has failed to come to fruition”. Very few cases have been brought by States at the ICSID. These are: *Gabon v Société Secrete SA ICSID* case no. ARB/76/1 where the proceedings were settled; *Tanzania Electric Supply Limited v Independent Power Tanzania Limited ICSID* Case NO. ARB/98/8; and *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others ICSID* Case NO. ARB/07/3. The consistent issue in all these cases is the challenge on the tribunal’s jurisdiction to entertain the State’s claims under the Convention, with the Respondent investors invariably arguing that states had no right to be Claimants under the ICSID Convention and that such right was exclusively reserved for foreign investors.

<sup>1128</sup> Birengel, (n) 1125.

<sup>1129</sup> Articles 20 and 24 of the 2016 Morocco-Nigeria BIT has been hailed as a “remarkable attempt made by two developing countries to bring investment treaties in line with the recent evolution in international law”, particularly with respect to sustainable development, protection of the environment, ethical transnational business practices, inclusion of private sector and civil society participation, and rights of states to bring actions against foreign investors. The SADC FIP excludes resort to international arbitration as the preferred ISDS mechanism, instead requiring reference and exhaustion of local remedies before resort to the SADC Tribunal. See, T Gazzini, “Nigeria and Morocco Move towards a ‘New Generation’ of Bilateral Investment Treaties” (2017) *EJIL* 2. See also, generally a discussion

parties should also extend further to local communities affected by the subject matter of the dispute. These include civil societies, expert or professional bodies, trade unions and non-governmental organisations, who currently have limited standing or audience before an ISDS arbitral tribunals.<sup>1130</sup> Opening up the court to its non-traditional actors will also greatly enhance the accountability and transparency of the African trade and investment dispute settlement system, particularly where public resources are concerned.

The UNCITRAL Working Group III, charged with the responsibility of identifying emerging issues in the ISDS system and recommending possible reforms to the system, has identified several challenges faced by the system as a reason for its non-optimal performance.<sup>1131</sup> The group cited the key problems of the system to include:<sup>1132</sup>

- (i) Divergent interpretation of substantive standards,
- (ii) Divergent interpretation relating to jurisdiction, admissibility, and procedural inconsistency,
- (iii) Lack of coherency or consistency in the decisions of tribunals,
- (iv) Lack of a framework to address multiple proceedings,
- (v) Limitation in the current system to address inconsistency and incorrectness of arbitral decisions,

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on the Morocco-Nigeria BIT by C Nyombi and T Mortimer and N Rmsundar, “The Morocco- Nigeria BIT: Towards a New Generation of Intra- Africa BITs” (2018) 29(2) *International Company and Commercial Law Review* 69-80. See Articles 25 and 26 of the SADC FIP. For a discussion on the dispute resolution mechanisms under the SADC FIP, see generally, Ngoben and Fagbayibo, (n) 975.

<sup>1130</sup> The 2006 ICSID Arbitration Rules 32, 34 and 37. See also the decision in *Vivendi Universal S.A v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curie (May 19, 2005).

<sup>1131</sup> UNCITRAL Draft Report of the Working Group III (on Investor-State Dispute Settlement Reform) identifies the following Part B-D, [25-132] 6-19. See,

[https://uncitral.un.org/sites/uncitral.un.org/files/draft\\_report\\_of\\_wg\\_iii\\_for\\_the\\_website.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf) accessed on 8<sup>th</sup> June 2019.

<sup>1132</sup> *ibid.*



- (vi) Lack or apparent lack of independence and impartiality of arbitrators and decision makers,
- (vii) Lack of clear or standardised qualification of decision makers,
- (viii) Lack of diversity of decision makers,
- (ix) Lengthy duration of ISDS proceedings,
- (x) Prohibitive costs associated with the system,
- (xi) Lack of accountability especially in matters involving public funds,
- (xii) Problems related to selection and impartiality of arbitrators, and
- (xiii) Concerns regarding third- party funding.

The group is currently considering proposals for reform of the ISDS system, including through a formal multilateral court system.<sup>1133</sup>

As global reforms to the ISDS system take shape, economic integration, including of dispute settlement systems, at the continental and sub-regional levels will be crucial. These will form building blocks for the proposed multilateral trade and investment court, while addressing intra-African trade and investment disputes. The continental mechanism may also offer a first instance court for the proposed multilateral court. The details of proposed structure and jurisdictional competence of the court shall be offered in the next chapter of this thesis.

The supranational AU single court's trade and investment chamber ('the Chamber') will eliminate the problems of the ISDS system identified above in the following ways. Firstly, the appellate process will ensure that the decisions of the apex (appeals) chamber, underlines consistency. This would be done through the application of the doctrine of precedent and the principle of supremacy, of the decisions of the ACJ&HR's court over all sub-regional and national courts in African economic integration matters. This would essentially establish the principle of supremacy of African continental law over sub-regional and national trade and investment laws.

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<sup>1133</sup> *ibid.* These problems are a mirror reflection of the problems of the ISDS system as identified by the EU, notes 1076-1079 above, and discussed in detail in Chapter Four of this thesis.

A requirement that all domestic and regional courts should refer questions on the interpretation and application of African economic law to the Chamber for a preliminary ruling, will also greatly enhance the growth, consistency, predictability and uniformity or unity of African community law. A requirement for the consolidation of all related claims will eliminate the current problem of forum shopping where investors often commence in a multiplicity of actions, both in international and domestic fora, in the hope of succeeding in some, if not all, cases. This will also ensure that there is neither the possibility of conflicting decisions rendered by judicial bodies on the same subject matter, nor a party having to defend the same claim before different adjudicative fora. It will also greatly save on costs and the time taken in dispute settlement.

Secondly, the proposed Chamber of the Court will also address the ethical issue of parties shopping for their preferred arbitrators, a feature that is common-place in investor-state dispute settlement. It will also give equal opportunity to all qualified Africans to serve as dispute resolvers in disputes involving Africans and African parties, emanating from the continent. It is proposed to set up two sections of the Chamber, one for trade and another for investment disputes. Since trade disputes are largely inter-state, it is proposed that the trade section of the Chamber should have representation of state-member appointed judges, whose recruitment will be competitive and merit based. The investment disputes section should be manned by highly qualified and experienced international arbitrators who will also be competitively recruited. Citizens of member states of the AU will all have an equal chance to serve on its panel of judges, for trade disputes; and as arbitrators in investment disputes. Detailed proposals on the qualifications, manner of appointment, tenure and jurisdiction of the judges and arbitrators to serve in the two sections will be set out in the next chapter of this thesis. In essence, the model of the Chamber should take the jurisdictional set up of sub-regional courts such as the COMESA Court of Justice, ECOWAS and the EAC, all of which provide both the traditional judicial dispute settlement system and also incorporate investment arbitration in their architecture.

Thirdly, the direct effect of the decisions of the Chamber in all member states to the ACJ&HR Protocol will enhance the effectiveness of enforcement of trade and investment decisions. This will be most useful in investment arbitration since successful parties will not have to contend with the uncertainty that comes with choice of law problems. Parties will also

effectively avoid domestic laws in seats of arbitration or countries of enforcement. This measure will also significantly cut down on the time spent in litigating in national courts over enforcement of international judgments and awards. The CJEU and OHADA models will form the basis for the structure that the requirement of direct effect should take.

### ***5.7.2 Why not an Entirely New Continental Trade and Investment Court?***

There have been various suggestions for the setting up of a pan-African Investment court and an African commercial court.<sup>1134</sup> Romantic as the idea of establishing a bespoke pan-African investment or commercial court may seem, it does not appear, at the moment, to be the right vehicle to carry forward the envisaged reforms in the ISDS system. This is primarily for two reasons. Firstly, economic integration encompasses two elements which are trade and investment. It follows, therefore, that a court which covers only one of these two elements does not fully address the issues that arise in the entire economic regionalism spectrum.

Secondly, the current circumstances of the AU do not seem to favour the establishment of a new permanent court. The AU is currently facing severe financial constraints, so much so that it has had its budget cut by 12 % in 2018.<sup>1135</sup> Indeed, the merger of the ACJ and the ACH&PR was partly predicated on the need to consolidate the AU organs for a more cost effective management of its shrinking resources.<sup>1136</sup> It would, therefore, not only be an ill-timed but financially burdensome proposition to create yet another AU organ, or even court.

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<sup>1134</sup> For example, Nyombi suggests the establishment of a Pan African Investment Court, while Onyema suggests the establishment of an African Commercial Court. They see these as possible solutions to the problems that have led to the dissatisfaction with the current multilateral ISDS (ICSID) system, and commercial arbitration. See, Chrispas Nyombi, A Case for a Regional Investment Court in Africa” (2018) 43(1) *North Carolina Journal of International law*, 67-96. E Onyema, “Reimagining the Framework for resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement” (2010) *World Trade Review* 1-25.

<sup>1135</sup> See, <<https://au.int/en/pressreleases/20180706/financial-reforms-african-union-lead-massive-cuts-unions-budgets>> accessed on 8<sup>th</sup> June 2019. See also, K Pharatlathe and J Vanheukelom, (n) 395, [1-2].

<sup>1136</sup> This is expressly acknowledged under Article 25 (2) of the ACJ&HR Protocol.

Furthermore, creation of a new international court is a dicey diplomatic undertaking with no guarantees as to the time it is likely for a protocol or treaty to garner the requisite ratifications for it to come into force, if at all. If experience is anything to go by, treaties establishing courts under the AU take several years, if not decades, to achieve the numbers required to come into force. It is much easier to plug into the existing AU single court by establishing a trade and investment chamber without the rigours and attendant uncertainty of negotiating a new protocol or treaty.

The improvement in Africa's economic fortunes will invariably enhance intra-African investment. It is estimated that upon full implementation of the AfCFTA, intra-Africa trade will rise from 15% to account for 25% of the trade volumes in Africa by 2040.<sup>1137</sup> An effective trade and investment dispute settlement system for intra-African trade and investments is, therefore, inevitably important. There is already substantial activity in the African economic regionalism space to justify the establishment of the court. As at the time of writing, 42 disputes involving African investors have been registered at the ICSID, 37 of which are against African states.<sup>1138</sup> The continental dispute settlement is, therefore, empirically also viable.

## **5.8. Summary**

The problem of fragmentation or proliferation of international law seems to have been compounded by the proliferation of international courts, regional and sub-regional arbitration centres and numerous investment codes and protocols. While the problem is not unique to Africa, the fault lines caused by fragmentation seem to be particularly deep in the sub-regional RECs in Africa. This chapter has identified and highlighted the causes of this fragmentation, the features through which it manifests itself and its consequences to the body of international law. The chapter has also interrogated the possible role of the AU single court in stemming the effects of this fragmentation through a harmonised continental overarching mechanism.

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<sup>1137</sup>UNECA Report 2018, n 20. See also, the IMF Report, H Fofack, "A Competitive Africa- Economic Integration Could Make the Continent a Global Payer" (2018) *Finance and Development* 48-51, at 51 recons that Africa has the potential of being a global player if the AfCFTA Agreement is implemented.

<sup>1138</sup> ICSID Caseload Statistics 2019, note 956 above.

The chapter has also identified and highlighted the role of international investment arbitration centres in Africa. These play a vital role in the private sector, government or REC promoted sectors, as the necessary building blocks for a harmonised, devolved or cascaded continental trade and investment dispute resolution mechanism. Similarly, this chapter has also identified the PAIC as an important centrifugal force for harnessing sub-regional synergies towards the proposed uniform African investment code under the AfCFTA.

The next chapter will draw conclusions from the discourse undertaken in this thesis and proffer recommendations.

## **CHAPTER SIX**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **6.1. Introduction**

The integration of markets and trade policies is a cumbersome process. It has to be undertaken with the acknowledgement of the diversity in socio-politico-legal and cultural backgrounds of member states. In reference to building strong supranational institutions, Fagbayibo notes that “it demands cautious and calculated steps, tactful negotiations, constant assurances and compromises, and the skilful management of national egoisms.”<sup>1139</sup>

This thesis set out to determine the possible role of the ACJ&HR in resolving trade and investment disputes in an integrated African economy. Its central focus was intra-African trade under both the AEC and AfCFTA integration arrangements. It evaluated the possibility of establishing a continental trade and investment dispute settlement mechanism to attend to the evolving continental economic integration. The role of RECs as building blocks for a devolved continental dispute settlement system was also interrogated.

This thesis consists of four substantive chapters and this chapter summarises the conclusions drawn from each chapter and then proffers recommendations.

#### **6.2. Summary of Findings and Conclusions**

It was observed that the primary objectives of integration are twofold: economic and political. However, other objectives have since also emerged, but with less prominence and include social, cultural, technical, environmental and human rights objectives. Fundamentally, therefore, integration of economies is a quest for the member nations’ general economic welfare and, hopefully, in the ultimate, global welfare.

While there are several theories of integration propounded, three principal approaches to integration have been preferred in Africa: intergovernmentalism, functionalism and

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<sup>1139</sup> B Fagbayibo, (n) 114, 500.

supranationalism. Intergovernmentalism is preferred in Africa because of its philosophical underpinnings, particularly since states retain their central role in integration.

It was noted that most African integration efforts are mostly intergovernmental and state-centric. Although Africa's economic integration also exhibits functionalist and neo-functionalist approaches to integration, it is intergovernmentalism that finds favour among African states. This is partly because intergovernmentalism seems to assure states of retention of their sovereign authority with little, if any, of its authority ceded to the integration organs. It is also partly embraced because of the intergovernmental origins of Africa's continental integration under the now defunct OAU. The OAU was essentially an intergovernmentalist approach to continental integration. Its successor, the AU, has followed the same approach, albeit with attempts at establishing supranational organs such as the ACJ&HR.

Overall, it was observed that trade and investment dispute settlement in Africa take two forms which is the judicial (adjudicative) and the diplomatic (non-judicial). Adjudicative methods offer legally binding outcomes, while diplomatic ones rely on the goodwill of parties for their observance.

Two procedural approaches are preferred in international dispute settlement: the use of permanent bodies, and ad hoc tribunals. It was also observed that non-formal methods employed in disputes resolution in Africa include: negotiation, mediation and conciliation. Formal dispute settlement methods commonly used in Africa include international courts and arbitral tribunals. International courts and tribunals in Africa are mostly supranational bodies, although they are often set up under intergovernmental organisations.<sup>1140</sup>

The weaknesses of the current formal adjudicative processes in Africa were identified as being twofold. These include the lack of supremacy of their decisions over national courts and the reliance on voluntary compliance with their decisions. Despite these weaknesses, settlement of

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<sup>1140</sup> The EACJ, the SADC Tribunal, the ECOWAS Community Court and the COMESA Court of Justice are examples of efforts at establishing supranational courts under integration organisations that are intergovernmental in nature.

trade and investment disputes in Africa still favours the use of adjudicative processes for three broad reasons. These reasons include the self-executing or direct effect of its decisions, especially with respect to international arbitration; domestic recognition and enforcement of international tribunals' decisions; and the perceived transparency of the processes of international tribunals which contribute to the predictability of norms.

The research established that political and economic factors affect the choice of an intentional dispute settlement systems. These include the functions of the organisation, the level of economic integration, the number of member states and the similarities in economic and social levels. The more nascent integration efforts, such as PTAs and FTAs, tend to opt for non-formal and non-binding dispute settlement procedures. The process of choice of an appropriate dispute resolution mechanism is incremental. The agreements are less complex and the preferred dispute settlement mechanisms are often ad hoc in bilateral relations, where only two states are involved.

The post-colonial history of efforts in the integration of the African continent occurred in different socio-economic, geo-political and domestic political contexts and dynamics. However, the golden thread running through the entire period was the need for either economic integration or cooperation through the establishment of continental and sub-regional intergovernmental economic blocs.

In 2001, the Constitutive Act of the AU created the AU to replace the OAU. A new push towards continental economic integration took root. The RECs deepened their integration with many achieving Customs Union, Common Markets and Monetary Unions.<sup>1141</sup> At this stage a need for strong supranational institutions arose to give effect to the objectives of the integration units.

In the upshot, this research advances that for the continental economic integration of Africa to succeed, it is imperative that it is supported by a legal system that underpins an efficient and effective dispute settlement system. In essence, it is argued that the economic integration of the

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<sup>1141</sup> The EAC progressed into a Customs Union and Common Market, it also concluded a Monetary Union Protocol. ECOWAS also concluded a Common Market and Customs Union Protocol and Monetary Union. COMESA transformed from a PTA to a Common Market.



continent must be underpinned by an African continental legal system anchored in an African community law; and a continental dispute settlement system whose centrepiece is the ACJ&HR, the AU single court. This thesis, therefore, proposes the deepening and underwriting of the continental economic integration of Africa through a robust supranational and devolved trade and investment dispute resolution system anchored on the ACJ&HR.

### **6.3. Recommendations**

The two principal objectives on which Africa's continental economic integration is anchored are: harmonisation of policies and regulation; and devolution through the sub-regional RECs.<sup>1142</sup> The role of the AU single court in Africa's economic integration, as perceived in this research, is to provide a supranational continental dispute resolution mechanism for intra-Africa trade and investment. In advancing this objective, RECs and sub-regional courts form the building blocks for the desired continental integration.

It is on the foregoing premises that the following seven recommendations are made.

#### **6.3.1 Institutional Superstructure of the Proposed Trade and Investment Chamber of the ACJ&HR as an Overarching Mechanism**

The two types of disputes identified in the continental economic integration require different approaches. Trade disputes largely fall within the realm of public law, and mostly involve states. Commercial and investment disputes are matters of private law and involve private parties. It is, therefore, proposed that a trade and investments chamber of the AU single court be created, with two sections: one for the resolution of trade disputes; and another to cater for investment and commercial disputes. To give effect to this proposal, an amendment to Article 19 of the Statute of the ACJ&HR will be necessary to provide for this additional chamber of the Court.

To achieve the desired harmony, and in line with the AU policy of using sub-regional RECs as building blocks for continental integration (as underscored in the AEC Treaty), it is recommended that a devolved structure of the court's trade and investment chamber be created.

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<sup>1142</sup> Article 6 of the AEC Treaty and Article 3 of the AfCFTA Agreement. See also the discussion in Chapter 3 of this thesis.

This will require that the judicial organs of the eight RECs in Africa serve as the devolved units of the ACJ&HR, with specific trade and investment disputes resolution mandates. This recommendation intends to not only ensure access to trade and investment justice throughout the expanse of the continent but to also make good use of the REC structures (including buildings), personnel as well as jurisprudence that have been built and developed over decades.

### **6.3.2 Overarching Jurisdiction of the Court: Supremacy, Direct Effect and Use of the Preliminary Ruling Procedure**

#### **(i) *Supremacy***

The current normative architecture and jurisdictional competencies of the Court lean heavily towards dealing with human rights and international criminal law cases.<sup>1143</sup> The design of the ACJ&HR's jurisdiction and competence, with respect to trade and investment dispute resolution, are not clothed with the requisite supremacy, or with precedence over national and sub-regional judicial organs. The principle of supremacy of the continental court is imperative in ensuring predictability of norms, thus ensuring efficiency of the system. This would guarantee a consistent interpretation and application of common continental trade and investment laws and regulations.

To achieve decisional and normative supranationalism, it is critical that the AU single court's decisions have direct effect in the domestic courts of its member states. It is also imperative that the Court have exclusive apex jurisdiction on matters of African Economic Community law. This can be achieved through the creation of an appellate jurisdiction for the Court in intra-African trade and investment disputes.

It is, therefore, further recommended that the REC Courts act as courts of first instance, with the ACJ&HR, serving as an appellate review mechanism. This recommendation is meant to ensure that there is consistency, coherency and uniformity in the interpretation and application of African continental trade and investment law. It will also help to develop a recognisable body of law that constitutes African Economic Community trade and investment law.

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<sup>1143</sup> Article 28 of the ACJ&HR Statute. The jurisdiction of the court is discussed in detail in Chapter 3.3.1 and 3.3.2 of this thesis.

To give effect to this recommendation, there is a need to amend the treaties establishing regional courts in Africa so as to expressly provide for the hierarchical structure of the African Court system, with the ACJ&HR at the apex while the regional courts serve as the courts of first instance. This recommendation is also in furtherance of the step-wise integration approach articulated in Article 6 of the AEC Treaty. Furthermore, this recommendation is in line with Article 3(l) of the AU Constitutive Act, which enjoins the AU to harmonise the policies and norms of the RECs under a continental umbrella.

To effectively achieve and advance its overriding status on matters relating to the African Economic Community law, it is recommended that decisions of the ACJ&HR's Trade and Investment Chamber be regarded as supreme over national courts and laws (including national constitutions); and sub-regional laws, organs and judicial organs.

***(ii) Direct effect***

It is also recommended that the decisions of the chamber have direct effect at both national and sub-regional levels without the intervention of the regional or national courts, or authorities. To this end, it is recommended that the OHADA approach be adopted, whereby member states are under obligation to enforce decisions of the OHADA CCJA, without any requirement to adopt proceedings under national laws.

***(iii) The Use of the Preliminary Ruling Procedure***

To achieve supremacy, consistency and coherence in African community law, it is recommended that national and regional courts request for a preliminary ruling from the ACJ&HR where the following matters are in issue:

- the interpretation of continental Trade and Investment treaties, protocols, codes, regulations or guidelines,
- the validity or interpretation of the Acts of the African Economic Community Institutions; or

- the interpretation of the statutes of bodies created by the African Economic Community.

It is further recommended that this procedure be available to national and regional courts before they pronounce their final judgment on a matter. It is proposed that this procedure be modelled along the lines of Article 234 of the Treaty, establishing the European Community, in terms of scope of matters to be referred.<sup>1144</sup> The EAC and COMESA models can also be adopted.<sup>1145</sup>

#### *(iv) Advisory Opinions*

It is recommended that Article 53, of Statute of the ACJ&HR, be amended to confer specific jurisdiction to the Court and particularly its trade and investment chamber. This is to give advisory opinions on matters of African trade and investment law to AU organs such as the Assembly of Heads of State and Government; the PAP; the Executive Council; the Peace and Security Council; AU financial institutions; and member states as may require such advisory opinions.

To give effect to this recommendation, it will be necessary that Article 28 of the Statute of the Court be amended to specifically provide for the supremacy, direct effect, preliminary ruling and advisory jurisdiction of the Court.

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<sup>1144</sup> Article 234 of the Treaty establishing the European Community provides that:

*The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*

- a) the interpretation of this Treaty;*
- b) the validity and interpretation of acts of institutions of the community and the ECB;*
- c) the interpretation of Statutes of bodies established by an act of the council, where those statutes so provide.*

*Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it give judgment, request the Court of Justice to give a ruling thereon.*

*Where any such question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, the court or tribunal shall bring the matter before the Court of Justice.*

<sup>1145</sup> The Preliminary ruling/ reference procedure and its application under the Article 29 of the EAC Treaty, Article 25 of the COMESA Treaty, Article 14 of the UEMOA Treaty, Article 16 of the SADC Tribunal Protocol and Article 10 of the Community court of the ECOWAS are discussed in chapter 4.2.2.3.2 of this thesis.

It is appreciated that African states will not easily give up the exercise of their sovereignty to a supranational continental judicial organ. This may explain the slow pace of ratifying protocols establishing continental courts. However, continental and sub-regional hegemony, which control substantial trade on the continent and stand to benefit most from free trade, can influence this aspect of the integration process. By adopting the supremacy of the continental trade and investment chamber of the court and requiring, through reciprocity, for its intra-African trading partners to follow suit, the court may find less resistance to its acceptance. Further, a cost-benefit analysis of deepening free trade may help persuade reluctant converts to adopt the supremacy of the court. All countries wish for economic prosperity, growth of trade volumes (from 17% to 52 %) and a resultant rise in GDP by up to four times, as a result of efficient cross border trade, may help put the proposition into a persuasive perspective.

### **6.3.3 Appointment and Qualifications of Judges and Arbitrators of the Trade and Investment Chambers of the ACJ&HR**

The appointment of judges of the Court by member states from amongst national court judges negates the perception of independence of the court from the appointing member states. Foreign investors are generally apprehensive of domestic courts, largely due to the perception of state control. To carry over the same judges to the AU single court, through the current appointment procedure that requires the secondment of national court judges to the court, will transfer the same perceptions and fears to the continental court.<sup>1146</sup> Therefore, it is proposed that a process of competitive recruitment, remuneration and retention of the members of the court be implemented. This ensures equity in representation and assures the judges of security of tenure and emphasises on the professional qualifications in international trade and investment law. This also ensures competence and high moral standing. These qualities will underwrite the integrity, meritocracy and independence of the court.

It is recommended that Article 3 of the Statute of the ACJ&HR be amended to increase the number of Judges from sixteen to at least 22 judges with at least six judges being allocated to the

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<sup>1146</sup> The current appointment mechanism under Article 6 of the Statute of the ACJ&HR enjoins states to nominate Judges to the court. The practice at both regional and continental courts has been for states to second serving judges of national courts to the regional or continental courts.

trade Section of the Court. In addition to the qualifications set out in Article 7 of the Court's Statute, it is recommended that the judges to serve in the trade section of the Court be persons trained in international trade law. Rather than see the different legal philosophies, cultures and languages on the African continent as being an impediment to a unified legal system, this variety in legal and cultural backgrounds should offer a mosaic of different perspectives that will enrich and ultimately, cultivate a robust *sui generis* African continental economic law.

It is further recommended that the persons serve in the investment disputes section of the Court's chamber and should possess qualifications in international arbitration. Furthermore, it is also proposed that the Judges and arbitrators serving in the trade and investment sections, respectively, should be recruited through a competitive process and not be appointed by member states to the protocol. The process should involve a public call for applications to all Africans in possession of the required qualifications. Thereafter, shortlisted applicants should be invited to participate in interviews conducted by a panel of peer reviewers using an objective evaluation criteria and transparent procedures. This will enhance the independence of the judges and arbitrators since they will not owe their appointment to any political facilitators, but will instead have been appointed purely on merit.

This recommendation is also aimed at enhancing the independence of the Court in general and insulate it from the control of state parties besides ensuring that only persons who possess the highest competence and qualifications are appointed to these positions. Through this move, it is also anticipated that the court's independence will be underwritten and the jurisprudence emanating from the court will be of the highest quality.

#### **6.3.4 Financing the Expanded ACJ&HR**

The research concluded that financial constraints of the AU have a direct relation with the independence of the court. Inadequate funding of African regional and sub-regional courts, and the AU itself, may also impact negatively on the operations and, ultimately, the effectiveness of the trade and investments chamber of the ACJ&HR.

There are at least four models of funding the expanded court explored. Firstly, state parties can fund the expanded court through their subscriptions to the AU. This is the ordinary way through which regional organisations raise resources. The second model involves payment of court fees by court users from state member countries and surcharging for citizens of non-member states. This approach has as the adverse potential of portending an increase in the cost for doing business and creating a barrier to access to justice for small traders who form the majority of African entrepreneurs.

The third proposal is attributed to reforms initiated by the immediate former AU Chairman, President Paul Kagame of Rwanda.<sup>1147</sup> The model, aimed at a sustainable financing of the AU and reducing its dependency on the EU and Asian support, involved the collection of a 0.2% levy on all imports into all AU member states from non-member states to fund the AU operations, projects and its activities.<sup>1148</sup> Since most African states are net importers of goods, mainly from Europe and Asia, the intention is to indirectly pass the cost of funding the AU to the countries exporting into Africa. This model is yet to find traction with most members yet to implement it.<sup>1149</sup> However recent statistics indicate that more African countries are willing and have started implementing the levy.<sup>1150</sup>

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<sup>1147</sup>At the 27<sup>th</sup> Ordinary Session of the AU Assembly of Heads of State and Governments in 2016, Rwanda's President Paul Kagame was entrusted with leading the institutional reform process in the AU. A raft of 19 measures aimed at streamlining the operations of the AU Commission were proposed, including a levy of 0.2% on all imports into Africa. This fund was meant to be collected by member states for purposes of financing AU activities and weaning it off donor funding. See, Turianskyi, and Gruzd note 398 above, at p.1-4.

<sup>1148</sup> This is one of the core 19 measures articulated in the Report by the then AU Chairman, Rwanda President Paul Kagame. See, note 394 above.

<sup>1149</sup> Although 21 countries have agreed to implementing this levy, only 12 are so far doing so, and another 5 have committed to start. Cameroon, Chad, Republic of Congo, Cote d' Ivoire, Djibouti, Gabon, The Gambia, Guinea, Kenya, Rwanda, Sierra Leone and Sudan are already implementing the Levy. Benin, Ethiopia, Ghana, Mauritania and Senegal have committed to implement the levy. but are yet to start. See, AU (2018) "Revised Report on the Implementation of the Kigali Decision on Financing of the African Union". Available at <https://au.int/sites/default/files/pages/34871-file-report-20institutional20reform20of20the20au-2.pdf>. Accessed on 3<sup>rd</sup> August 2019.

<sup>1150</sup> *ibid.*

There is a fourth model that is connected to the third. It involves regional economic hegemons that stand to benefit most from the free trade arrangements entered into at both the continental and sub-regional levels. Countries such as South Africa in the south, Nigeria in the west, Kenya in the east, and Egypt in the north form the regional economic hegemons in Africa.<sup>1151</sup> This is primarily because these regional economic powerhouses exert influence in their respective economic blocs through investments, macro-economic stability and general economic strength. These regional hegemons can play a critical role in ensuring the success of continental integration as a whole.<sup>1152</sup> Indeed, countries such as Egypt and South Africa have already indicated their willingness to collect, through other means, the levy necessary to finance the operations of the AU organs.<sup>1153</sup> Countries that are willing to pay beyond the prescribed 0.2 % levy should by all means be encouraged to do so.

A combination of the four models for financing the court will suffice. Each approach addresses different aspects and unique circumstances. Reasonable court fees paid by users of the court will serve two primary purposes; to deter frivolous claimants, and to ensure that cost is not a deterrent to accessing justice. It will also mitigate the financial hardships which may occur due to the chronic delays and defaults by African states in meeting their subscription obligations to regional organs.

In the upshot, however, the architecture of the chamber as proposed does not materially change the structure of the court as it is currently set up. It merely proposes to expand the court by creating a trade, commercial and investments disputes chamber. It also proposes to devolve the court through the existing RECs. As a result, the court will still be financed as a part of the AU single court and the sub-regional REC courts. The financing proposals made in this thesis aim to avoid dependency on donor funding, reduce reliance on member states' contributions, ensure self-sustainability of the court, and to promote access to the court.

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<sup>1151</sup> For a discussion on the political and economic influence of Regional hegemons in Africa, see Fagbayibo B. note 32 above, at p. 54-56.

<sup>1152</sup> *ibid*, 55-56.

<sup>1153</sup> Y Turianskyi and S Gruzd, (n) 399 17.



### 6.3.5 Access by Individuals

Individuals, natural or juristic, can only access the ACJ&HR in human rights and international crimes cases. Article 28 of the Statute of the ACJ&HR and Article 6 of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, also make the resolution of disputes under the two instruments of an inter-state affair. As a result, they exclude individuals from accessing the court on their own right.

The foregoing provisions limit the jurisdictional competence of the dispute settlement mechanisms by excluding, all together, investor-state disputes and commercial disputes between private parties. The irony here is that individuals are the motors which drive trade and investment. It, therefore, undermines the essence of the entire system when disputes arising from transactions between individuals are excluded from the primary dispute settlement mechanisms that are created to promote cross-border trade.

The ACJ&HR and AfCFTA dispute resolution systems only attends to (public law) inter-state disputes without addressing the private party disputes at the micro level. Interestingly, the current regime also seems oblivious to the fact that states can also be private legal persons while acting in a commercial capacity through state entities and corporations.

The architecture of the current system may be sufficient to deal with public law inter-state disputes. However, access to the processes used for resolution of investment and commercial disputes at the micro-level, where individuals form the central actors, require reform.

Access to justice, for both natural and juristic persons, is crucial to effective economic integration of the continent. Access to justice is a concept accepted in international law as being a universal, inalienable and inviolable right.<sup>1154</sup> It refers to both judicial and administrative remedies and procedures available to persons aggrieved or likely to be aggrieved by a matter. Access by

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<sup>1154</sup> Article 8 of the Universal Declaration of Human Rights (1948) (UDHR)

<[https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)> accessed on 5<sup>th</sup> August 2019.

individuals to the ACJ&HR, particularly its commercial and investments section, is crucial for the attainment of continental trade and investment justice.

Although accruing largely in the area of human rights, the significant contribution to the development of progressive jurisprudence by the continental and sub-regional courts in Africa is largely attributable to cases filed by individuals, NGOs and civil society groups. The role of public spirited pressure groups in trade and investment policy formulation and execution is significant in this era of sustainable development goals, environmental protection, human rights and ethics in transnational trade. NGOs and civil society groups act as vanguards or guarantors of these principle, particularly against multinational corporations with financial muscle and political influence. It is, therefore, recommended that NGOs and civil society groups be accorded access to the Court in public interest litigation and matters that concern common community interests.

To give effect to this proposal, it is recommended that Article 28A of the Court's Statute be amended to specifically confer rights of access to the court's trade and investment chamber, by individuals, both natural and juristic. The chamber's jurisdiction to entertain trade and investment disputes should be expanded to include investor-state, state-state, and disputes between private disputants, *inter se*. In public interest matters (which involve matters such as investment of public funds and environmental issues), civil society groups, NGOs, bodies with observer status at the AU, as well as members of the academia (as *amicus curie*), should similarly be granted rights of audience and access to the Court.

This expanded access to the court by various actors is likely to make the Court more vibrant, forward looking, develop a more expansive and incisive jurisprudence and, in the ultimate, espouse a versatile trade and investment regime that is unique to the social-cultural-economic and political mosaic of Africa.

#### **6.3.6 Enforcement of Decisions**

Enforcement of international courts' decisions is a perennial problem that emanates from a lack of coercive powers by international organisations to enforce their decisions. International courts,

therefore, largely depend on domestic courts' enforcement mechanisms to give effect to their decisions even where treaties for recognition and enforcement exist.

In strengthening the enforcement mechanisms of the proposed chamber's decisions, three approaches have been considered and recommended. The first is to adopt the approach taken by the CJEU. Article 260 of the CJEU Treaty confers jurisdiction upon the Court to sanction a state member that fails to comply with the Court's Judgment by meting out fines and other punitive orders including declarations of breach under Article 253 and 259. Such jurisdiction is absent from the Protocol and Statute of the ACJ&HR. It is recommended that the Protocol and Statute be amended to grant the court similar jurisdiction.

The second approach is where the judgement is enforceable as a decision of the highest domestic courts without the rigours of adoption through national law processes. This approach is preferred by investor friendly states with common business laws, such as those in the OHADA region. It is also the approach taken through treaty enforcement interventions such as the New York Convention and ICSID. Other effective approaches have also evolved. The ECOWAS Court of Justice has an enforcement organ in each state that can follow the implementation of the decision of the Court.

A hybrid of the foregoing three approaches will suffice. A unit established in every member state for monitoring implementation of the court's decisions, similar to the one used by ECOWAS is proposed. The direct effect of decisions of a supranational court/arbitral tribunal without domestic recognition procedures has been largely successful in the OHADA region. It has therefore been a testament to the ability by Africans to embrace supranational regulation and dispute resolution, particularly in commercial matters.

#### **6.3.7 Harmonisation of Continental and Sub-Regional Investment Arbitration through the AU Single Court**

In an effort to reign in the proliferation of investment codes and international arbitration on the continent, it is proposed that the Chamber is conferred with commercial and investment arbitration

jurisdiction. The PAIC presents a viable remedy to the problem of fragmentation of investment codes in Africa. The ACJ&HR should be the preferred mode of settlement of investment disputes under PAIC. This will not only address the problem of proliferation of investment codes in Africa, but also harmonise continental investment policies and regulation.

However, for it to be effective, the PAIC dispute settlement system should allow not only for state-state but also investor – state dispute resolution. This should be for both African and foreign investors. To give access to its dispute settlement system, the PAIC should merge and harmonise the sub-regional codes and devolve its tenets to RECs and national levels.

A commercial and investments disputes section of the ACJ&HR Trade and Investment Chamber specifically entrusted with the role of intra-Africa investment arbitration will ameliorate the problems identified as arising out of the proliferation of commercial and investment arbitration in Africa. Firstly, it will lead to the harmonisation and development of an African community investment law. Secondly, it will also develop the capacity and experience of African Arbitrators in international arbitration, as well as in readiness for international assignments. Thirdly, it will also offer, through the ACJ&HR, a recognition and enforcement mechanism for arbitral awards and therefore, avoid or limit interaction with domestic courts which are perceived to be state influenced. This will give comfort to the intra-African and foreign investors, of the transparency and integrity of the dispute settlement system. To this end, it will be imperative that the arbitrators on the ACJ&HR roster be recruited competitively, on merit, without the option of states nominating members to the panel.

In the spirit of harmonisation of African Investment laws, codes and protocols, and in line with the Preamble and Article 3 (c) of the AEC Treaty, it is proposed that all the sub-regional investment protocols be aligned with the PAIC so as to ensure harmony in African investment law. In terms of dispute resolution, arbitration under the ACJ&HR and/or sub regional courts should be specifically included in the PAIC, as the preferred or prescribed method for resolution of all intra-African investment disputes.

#### **6.4. Contribution to Practise**

The conclusion of the 1991 AEC Treaty formally set in motion the creation of the Africa Economic Community. This was to be achieved by 2030. Even before the ACJ created under Article 28 of the Treaty was established, significant events that would reshape the route to the continental economic integration occurred. Firstly, there was the decision, in 2008, to amalgamate the ACJ and the ACH&PR into the ACJ&HR, as the AU single court. Secondly, the promulgation of the Constitutive Act of the AU in 2001, stressed the importance of continental economic integration.

Despite the evolution of the AU and its ideas on continental trade and investment, the theme that remains constant throughout the various instruments on continental integration is the harmonisation of trade and investment regulation; and the use of sub-regional RECs as the building blocks of continental integration. It, therefore, has become necessary to re-evaluate the dispute resolution systems available in supporting and promoting intra-African trade and Investment.

There have been suggestions on the modelling of an appropriate investment dispute resolution regime for the continent, including suggestions for a Pan African Investment Court and a commercial court. However, none of the proposals have attended to the most important aspects of finding the basis of an effective trade and investment disputes settlement system in Africa. Firstly, the system should acknowledge the twin principles of harmonisation of the continental AU adjudicative system, as well as devolution through sub-regional courts. The system must, therefore, be knitted into the AU superstructure, while acknowledging the rich jurisprudence and infrastructure built by the sub-regional courts, with some being for over 50 years. In essence, the system must build a truly continental community law that is predictable and uniformly applied across the continent; and avoid further fragmentation of the continent. The proposals made in this thesis speak to all these imperatives.

While there is no gainsaying, the critical role that a reliable, independent, efficient and acceptable continental dispute resolution plays in strengthening an integration effort, access to the system and enforcement of its decisions will determine its success. The proposals advanced in this thesis seek to ensure that the decisions that emanate from the proposed trade and investment chamber of the court are easily and promptly enforced.

The AU has set 2030 as the year in which it will decide the readiness of the continent for the creation of a single government and the form it should take. This date coincides with that set for the complete and successful implementation of the AEC Treaty. If successfully implemented, the integrated continental court should offer a useful tool for evaluating the readiness of the continent, in the creation of the single government and the appropriate form it should take.

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